Supreme Court, U.S.
FILED

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No.

IN THE

# Supreme Court of the United States

MICHAEL MALOUF,

*Petitioner,*

*v.*

UNITED STATES OF AMERICA,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

## PETITION FOR WRIT OF CERTIORARI

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Dated: February 17, 2007

BOWMAN & SLADE, INC. BOSTON, MASSACHUSETTS

## QUESTION PRESENTED

I. Whether the United States Court of Appeals for the First Circuit erred in reversing the holding of the United States District Court which held that the decisions of the Supreme Court in *Blakely v. Washington*, 542 U.S. 296 (2004) and *United States v. Booker*, 543 U.S. 220 (2005) overruled earlier decision of the Supreme Court in *Harris v. United States*, 576 U.S. 227 (1999) and *McMillan v. Pennsylvania*, 477 U.S. 79 (1986).

II. Whether the Due Process Clause of the Fifth Amendment requires the application of the beyond a reasonable doubt standard to drug quantity which triggers a substantial mandatory minimum sentence under 21 U.S.C. § 841.

III. Whether the statutory structure of 21 U.S.C. § 841 establishes a logical or rational basis to conclude that drug quantity is a sentencing factor for determining a mandatory minimum sentence or an element of the offense for determining the applicable maximum.

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## PETITION FOR A WRIT OF CERTIORARI

Michael Malouf respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

## OPINIONS BELOW

The opinion of the court of appeals (App., *infra.*, 5a) is reported at 466 F.3d 21. The order of the court of appeals denying the petition for rehearing and a rehearing en banc was denied on November 21, 2006. App., *infra.*, 1a is reported at 377 F.Supp.2d 215.

## JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part that "No person shall . . . be deprived of life liberty or property without due process of law . . .".

The Sixth Amendment to the United States Constitution provides in relevant part that "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . .".

The pertinent provisions of 21 U.S.C. § 841 are reprinted in an appendix to this petition. (App., *infra.*, 64a-76a).

## STATEMENT

On May 28, 2004, Michael Malouf (Petitioner) pleaded guilty without a plea agreement to a one count indictment charging that he conspired to distribute, and that he possessed with intent to distribute, five kilograms or more of cocaine and a quantity of marijuana, in violation of 21 U.S.C. §§ 846 & 841(a)(1)(b)(1)(A). (App., *infra.*, 35a). On February 19, 2004, the government filed an information pursuant to 21 U.S.C. § 851 notifying Petitioner that he was subject to enhanced penalties under 21 U.S.C. §§ 841(b)(1)(A) and 841(b)(1)(B) on account of his prior felony drug conviction. (App., *infra.*, 36a).

A sentencing hearing took place on December 20, 2004; March 15, 2005; and March 23, 2005 following which the district court sentenced Petitioner to 60 months' imprisonment and six years' supervised release. (App., *infra.*, 38a).

The court of appeals reversed the district court and remanded the case to the district court for sentencing consistent with the opinion of the court of appeals. (App., *infra.*, 15a).

During the course of a drug trafficking investigation commenced by the Federal Bureau of Investigation (FBI) in 2001, certain telephone calls were intercepted to and from the telephone of one Stephen Nicholson, a co-defendant of Petitioner. The interceptions were made between April 14, 2002 and June 13, 2002. (App., *infra.*, 6a). The calls implicated Petitioner in a number of cocaine sales by Nicholson to Petitioner.

At the change of plea hearing, petitioner admitted that he conspired with others to distribute cocaine and marijuana. Petitioner also agreed that the conspiracy-wide drug weight was five kilograms or

more. (App., *infra*,. 38a). Petitioner did not admit the specific quantity of drugs for which he was to be held responsible. Petitioner, through counsel, informed the district court that he was responsible for less than 500 grams. (App., *infra*., 38a). The government agreed that the issue of weight was appropriately preserved for sentencing. (App., *infra*., 38a).

At the sentencing hearings, the government contended that petitioner was responsible for 31.5 ounces of cocaine and four pounds of marijuana. The government argued that 11 ounces of cocaine was purchased before the wiretap period (allegedly through the testimony of a confidential informant) and 20.5 ounces allegedly purchased during the period between April 14, 2002 and June 13, 2002. The government withdrew the allegation of 11 ounces of cocaine purchased before the wiretap period. (App., *infra*., 39a).

During the course of the wiretap period, the government alleged that there were seventeen cocaine transactions between petitioner and another and an additional transaction involving two ounces of cocaine on April 15, 2003, prior to the wiretap period. (App., *infra*., 39a). Petitioner contested four of the eighteen cocaine transactions arguing that he should not be held accountable for the April 15, 2003 transaction as it was outside of the wiretap period. Petitioner contended that three cocaine transactions, on April 25, 2003, April 27, 2003, and June 11, 2003, should not be counted against him for sentencing purposes. The district court dismissed petitioner's objection to the April 15, 2003 transaction. (App., *infra*., 59a).

After dismissing Petitioner's objection to the April 15, 2003 transaction, the district court turned to the transaction on April 25, 2003, April 27, 2003, and June 11, 2003. With regard to the April 25, 2003 transaction, the district court found that Petitioner

and another agreed to meet at a location. The district court further found that agents saw Petitioner arrive and meet Nicholson. The district court further found that Nicholson reached into his motorcycle helmet and, according to the surveillance agent, take something out of his helmet. At this point, Petitioner reached into his right pocket and they each drove away. *United States v. Malouf*, 377 F.Supp. 2d 315, 330 (D. Mass. 2005). The district court concluded that applying either a preponderance of the evidence standard or a beyond a reasonable doubt standard, the evidence was insufficient to establish the transaction alleged. (App., *infra.*, 59a-61a).

With respect to the April 27, 2003 transaction concerning a meeting between Petitioner and Nicholson, the government contended that when the surveillance agent observed petitioner exit his motor vehicle, open the trunk and place a brown lunch bag in the trunk, there was a probability that the lunch bag contained cocaine. The district court concluded that the evidence was insufficient applying either a preponderance of the evidence standard or a beyond a reasonable doubt standard. *United States v. Malouf*, *supra*, at 330. (App., *infra.*, 59a-60a).

In addressing the facts surrounding the events of June 11, 2003, the district court stated that "This transaction was a close call." *United States v. Malouf*, *supra*, at 330. If petitioner was not held accountable for a one-ounce transaction on June 11, 2003, the ten-year minimum mandatory sentence would not apply. The district court stated that "Without these three transactions on April 25, April 27, and June 11, Malouf's distribution totals fell below 500 grams and the minimum mandatory did not apply." *United States v. Malouf*, *supra*, at 331. The district court concluded that Malouf was responsible for 17.5 ounces or 496.125 grams of cocaine. In reaching this determination, the court stated that if the standard of

a preponderance of the evidence were applied to the June 11 transaction, the court would agree with the government and charge an additional one ounce to Petitioner, thereby taking Petitioner's distribution total from 17.5 ounces to 18.5 ounces or 524.475 grams. The district court, however, applied a beyond a reasonable doubt standard to the June 11 transaction. *United States v. Malouf, supra,* at 331. Applying the sentencing guidelines, the court sentenced petitioner to imprisonment for a period of 60 months with the requirement of drug treatment while in confinement as well as after his release on supervised probation. The court stated that "Malouf's sentence was more than adequate to meet the purposes of sentencing under 18 U.S.C. § 3553(a); it enabled him to receive treatment for his addiction and to be punished and to be off the street for a considerable period of time". *United States v. Malouf.* (App., *infra.*, 60a-61a).

The district court noted in its Sentencing Memorandum that "This case is about the interpretation of an important federal drug distribution statute 21 U.S.C. § 841 under which the defendant Michael Malouf was indicted." *Malouf, supra* (App., *infra.*, 33a). The district court in considering *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and *Harris v. United States*, 536 U.S. 545 (2002) in the light of *Blakely v. Washington*, 542 U.S. 296 (2004), *United States v. Booker*, 54 U.S. 220 (2005) and *Shepard v. United States*, 125 S.Ct. 1254 (2005), raised the question as to "whether, as the Supreme Court's decisional law has changed, the interpretation of 21 U.S.C. § 841 should likewise change." *Malouf*, (App., *infra.*, 34a). Responding to its own question, the district court stated that "In my judgment, the breadth of the holdings in *Booker* and *Blakely* have, in fact, overruled *Harris*. The court has gone from holding that the Sixth Amendment is implicated in the determination of facts that increase

a statutory maximum (*Apprendi*) to applying the Sixth Amendment to all facts 'essential to the punishment' (*Booker* and *Blakely*). It has extended the application of the Sixth Amendment from statutory maximum penalties (*Apprendi*) to the mandatory "Guidelines" (*Booker*). And even if one does not characterize the group of holdings as overruling *Harris*, plainly the reasoning underlying them does overrule *Harris*." (App., *infra.*, 52a-53a).

In addition, the district court held that 21 U.S.C. § 841 "is an offense-defining statutory provision, all elements of which must be tried before the jury." (App., *infra.*, 55a).

The district court also held that the message of *McMillan v. Pennsylvania*, 477 U.S. 79 (1986) is, in effect, that when drug quantity dictates a substantial sentence, the public and the court should have "a high degree of confidence" in the finding of drug quantity. (App., *infra.*, 58a).

## REASONS FOR GRANTING THE WRIT

The appeals court, in analyzing the district court's opinion, rejected the district court's conclusion that *Blakely* and *Booker* together constitute a movement by the Court toward an "impact test" rather than distinctions between sentencing factors and offense elements. (App., *infra.*, 13a). The district court held that this "impact test" undermines, if not eliminates, the distinction between mandatory minimums and statutory maximums and therefore, according to the district court, the Court in *Blakely* and *Booker* "have gone from holding that the Sixth Amendment is implicated in the determination of facts that increase the statutory maximum (*Apprendi*) to applying the Sixth Amendment to all facts 'essential to

the punishment' (*Blakely* and *Booker*)" (App., *infra.*, 52a).

Notwithstanding the foregoing, the appeals court, in rejecting the district court's conclusions, stated that "We need not delve deeper into the district court's analysis because since its opinion issued on June 14, 2005, we have had cause to consider the continued vitality of *Harris* in light of Supreme Court case law. Approximately ten months after the district court decided *Malouf*, we decided the case of *United States v. Lizardo*, in which we held that '*Booker* left in tact the Supreme Court's precedent in *Harris*, which allowed the use of judicially found facts to increase a mandatory minimum sentence.'" (App., *infra.*, 13a).

Petitioner contends that the court of appeals erred in rejecting the analysis of the district court with respect to the applicability of the Sixth Amendment. The district court clearly stated that "In my judgment the breadth of the holding in *Blakely* and *Booker* have, in fact, overrode *Harris*. The court has gone from holding that the Sixth Amendment is implicated in the determination of facts that increase a statutory maximum (*Apprendi*) to applying the Sixth Amendment to all facts "essential to the punishment" (*Blakely* and *Booker*). It has extended the application of the Sixth Amendment from statutory maximum penalties (*Apprendi*) to the mandatory "Guidelines" (*Booker*).

Petitioner submits that support for the district court's analysis is also found in the dissenting opinion in *Harris*. There, as the district court notes, Justice Thomas, joined by Justices Stevens, Souter, and Ginsburg stated that *Apprendi* applies whenever a "fact exposes a defendant to greater punishment than what is otherwise legally prescribed" whether that fact "raises the floor or raises the ceiling" (App., *infra.*, 45a) and in *Cunningham v. California*, 126 S. Ct. 1329 (2006), Justice Ginsberg wrote that "This Court has

repeatedly held that under the Sixth Amendment, any fact that exposes a defendant to a greater potential sentence must be found by a jury, not a judge, and established beyond a reasonable doubt, not merely by a preponderance of the evidence."

In *Blakely*, the Court stated that all facts "which the law makes ess ntial to the punishment" are subject to the Sixth Amendment protection. *Blakely* at 302. In considering this language, the district court concluded that the Court "chose an 'impact' test, focusing on the impact of such facts on punishment rather than on the formulative distinctions between sentencing factors and offense elements. Its concerns were not simply about a fact's, effect, on the statutory maximum, but more generally about its effect on punishment." (App., *infra.*, 48a).

In declaring that "the breadth of the holding in *Booker* and *Blakely* have, in fact, overruled *Harris.*." the district court specifically stated that it was not engaged "in anticipatory overruling." (App., *infra.*, 52a). Rather, the district court, referencing *Plessy v. Ferguson*, 163 U.S. 537 (1896), and *Brown v. Board of Education*, 347 U.S. 483 (1954) stated that it reached the conclusion that Supreme Court decisional law has extended the application of the Sixth Amendment from statutory maximum penalties to facts which trigger mandatory minimum penalties. (App., *infra.*, 52a). In reviewing the decision of the district court, the appeals court rejected the analysis of the district court by asserting that "*Booker* left intact the Supreme Court's precedent in *Harris* which allowed the use of judicially found facts to increase a mandatory minimum sentence." (App., *infra.*, 13a).

Petitioner contends that the issue as to whether the Sixth Amendment should be applied to facts which trigger a mandatory minimum sentence was not simply about a fact's effect on the statutory maximum,

but more generally about its effect on punishment." (App., *infra.*, 48a). The district court also referenced a decision of the Sixth Circuit in which the court held that "[a]ggravating factors . . . that increase the penalty from . . . a lesser to a greater minimum sentence are now elements of the crime to be changed and proved". . . The court characterized *Apprendi* as having two holdings: [F]irst that courts must count any fact that increases the penalty beyond the prescribed statutory maximum and an element of the offence . . . and second, that it is unconstitutional for a legislature to treat facts that increase the prescribed range of penalties to which a criminal defendant is exposed as mere sentencing factors. . . " *Id.* at 350. (Siler, J. concurring) (App., *infra.*, 47a). The district court in this case stated that "It is difficult to envision a situation in which a fact that determines a mandatory minimum is not considered 'essential' to punishment." For Malouf, the mandatory minimum takes him from a Guidelines range that could only go as high as 71 months (without departure) to 120 months." (App., *infra.*, 55a).

Petitioner respectfully submits that the issue as to whether the Fifth Amendment should be applied to facts which trigger a mandatory minimum sentence so as to require proof of those facts beyond a reasonable doubt also raises a serious question of constitutional law. In this context, the district court stated with regard to drug quantity that "if quantity figures so prominently in this important decision, it is not unreasonable to ask, as the court did of the Federal Sentencing Guidelines in *United States v. Gray*, 362 F.Supp.2d 714 (S.D.W.Va. 2005) what level of confidence should a decision maker have in that fact before it sentences? The burden of proof that *Gray* court noted allocates the "risk of error between the litigants" and indicates the relative importance attached to the ultimate decision." *Id.* at 720. (quoting *Addington v. Texas*, 441 U.S. 418, 423, 99 S.Ct. 1804,

60 L.Ed 323 (1979). "As a tool for reducing the risk of error" the court noted, "reasonable doubt retains its usefulness in the advisory regime." *Id.* at 723. In this case, I go further. If a substantial sentence hinges on a finding of a specific quantity, then, in the language of *Gray*, I and the public should have a high degree of confidence in the finding. In effect, this was the meaning of the Court in *McMillan v. Pennsylvania*, when despite upholding a mandatory minimum sentence of five years for visible possession of a firearm, *see supra*, note 11, the Court suggested a different result when the statute at issue gives the "impression of having been tailored to permit the visible possession finding to be a tail which wags the dog of the substantial offer." *Id.* at 28, 100 S.Ct. 2411.

"Moreover to the extent that the procedural concerns of the majority in *Booker* were assuaged by construing the Guideline as advisory, that alternative is not available under § 841. Once a given quantity is found, the statute is mandatory and binding." (App., *infra.*, 58a).

In the final analysis, it is extremely difficult, if not impossible, to find logic and fundamental fairness in a sentencing process which requires that facts which the government seeks to utilize to take a sentence beyond the statutory maximum must be proved beyond a reasonable doubt while facts which take a sentence out of the advisory guidelines into a mandatory minimum category need only be established by a preponderance of the evidence.

In addition to the foregoing, petitioner contends that drug quantity is an element of the offenses defined in 21 U.S.C. § 841. The court of appeals below, in *United States v. Goodine*, 326 F.3d 26 (1st Cir. 2003) observed that "The distinction between 'elements' and 'sentencing factors' can be elusive. See *Apprendi v. New Jersey*, 530 U.S. 466, 494, 1476 Ed.

2d 435, 120 S.Ct. 2348, and we admit that we have been wrong on similar questions before. *See United States v. Rivera Gomez*, 67 F.3d 993, 996 (1st Cir. 1996) (holding that the federal carjacking statute identified only on crime; later rejected by the Supreme Court in *Jones v. United States*, 526 U.S., 227, 229, 143 L.Ed. 2d 311, 110 S.Ct. 1215 (1999). . .".

The foregoing was written prior to *Blakely*, *Booker*, and *Shepard* and just as the court of appeals found the distinction between "elements" and "sentencing" factors to be "elusive" and "complicated" under *Apprendi* and other Supreme Court decisions, so too these same issues are further complicated by *Blakely*, *Booker*, and *Shepard*. In *Goodine*, the court stated that "Before *Apprendi*, we held that drug-quantity delineations contained in § 841(b)(1) were sentencing factors that could be determined by a preponderance of the evidence. . . However, we have noticed that the Supreme Court's decision in *Apprendi* requires some rethinking of this approach. ..". *Goodine* at 27.

The appeals court below, after a review of the relevant Supreme Court decisions, as well as lower court decisions, concluded that drug-quantity, for the purposes of § 841, is a sentencing factor that may be determined by a preponderance of the evidence.

The district court in the case at bar while recognizing that *Goodine* held that "factors that increase the minimum sentence but do not increase it beyond the maximum are not subject to *Apprendi's* safeguards". *Malouf*, 377 F. Supp. 2d at 326 proceeded to analyze Section 841 in light of *Blakely*, *Booker*, and *Shepard*. Having done so, the district court decided that "The better view in my judgment is to conclude that § 841 is an offense-defining statutory provision, all elements of which are tried before a jury." *Malouf*, at 328. The District Court then treated

Malouf's plea "as an admission to one element of conspiracy – that he was a participant in a conspiracy – but I reserved for a jury-waived trial the determination of another element – statutory quantity". *Malouf* at 328. *See also United States v. Gonzalez*, 420 F.3d 111 (2nd Cir. 2005) where the court held that drug quantities that measure sentencing maximums as well as minimums required proof beyond a reasonable doubt. In *Gonzalez*, the court wrote that "Nothing in the structure of the statute suggest that [the corresponding minimums and maximums in § 841(b)] can be delineated to permit mixing and matching across subsections to create hybrid sentencing ranges not specified by Congress. . . Much less does the statutory structure of § 841 suggest Congress' intent to cast drug quantity in a dual role: performing as a sentencing factor for purposes of determining the applicable minimum sentence but as an element for purposes of determining the applicable maximum. *Gonzales* at 121-122.

In view of the foregoing, petitioner respectfully argues that drug quantity is an element of the offenses defined in 21 U.S.C. § 841 and must be established by proof beyond a reasonable doubt.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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*Attorney for Michael Malouf*

Dated: February 17, 2007

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**APPENDIX A**

**United States Court of Appeals**
**For the First Circuit**

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No. 05-2245

UNITED STATES

Appellant

v.

MICHAEL MALOUF

Defendant – Appellee

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Before

Boudin, Chief Judge,
Torruella, Selya, Lynch,
Lipez, Dyk* and Howard,
Circuit Judges.

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ORDER OF COURT
Entered: November 21, 2006

Pursuant to First Circuit Internal Operating Procedure X(C) the petition for rehearing en banc has also been treated as a petition for rehearing before the original panel. The petition for rehearing having been denied by the panel of judges who decided the case and the petition for rehearing en banc having been submitted to the active judges of this court and a majority of the judges not having voted that the case be heard en banc, it is ordered that the petition for

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* Of the Federal Circuit, sitting by designation.

rehearing and petition for rehearing en banc be denied.

By the Court:

RICHARD CUSHING DONOVAN

Richard Cushing Donovan, Clerk.

[cc: William D. Weinreb, AUSA, Dina Michael Chaitowitz, AUSA, Frank J. McGee, Esq., Judith M. Mizner, AFPD]

**APPENDIX B**

**United States Court of Appeals**
**For the First Circuit**

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No. 05-2245

UNITED STATES OF AMERICA,

Appellant,

v.

MICHAEL MALOUF,

Defendant – Appellee.

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**JUDGMENT**

Entered: October 13, 2006

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts and was argued by counsel.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The district court's decision is reversed, and the matter is remanded for sentencing in accordance with the opinion issued this day.

By the Court:

RICHARD CUSHING DONOVAN

Richard Cushing Donovan, Clerk

**Certified and issued as Mandate under Fed. R. App. P. 41.**

**Richard Cushing Donovan, Clerk**

**/s/**_____
**Deputy Clerk**

**Date:** 11/28/06

[Certified copies to Hon. Nancy Gertner and Ms. Sarah Thornton, Clerk, United States District Court for Massachusetts. Copies to Mr. Weinreb, Ms. Chaitowitz, Mr. McGee & Ms. Mizner.]

**APPENDIX C**

**United States Court of Appeals**
**For the First Circuit**

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No. 05-2245

UNITED STATES OF AMERICA,

Appellant,

v.

MICHAEL MALOUF,

Defendant, Appellee.

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APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS
[Hon. Nancy Gertner, U.S. District Judge]

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Before

Boudin, Chief Judge,
Torruella and Dyk,* Circuit Judges.

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William D. Weinreb, Assistant United States Attorney, with whom Michael J. Sullivan, United States Attorney, was on brief, for appellant.

Frank J. McGee, on brief, for appellee.

Judith H. Mizner, Assistant Federal Public Defender, Federal Defender Office, with whom Miriam Conrad, Federal Public Defender, Districts of

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* Of the Federal Circuit, sitting by designation.

Massachusetts, New Hampshire and Rhode Island, was on brief, as amicus curiae in support of appellee.

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October 13, 2006

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**TORRUELLA, Circuit Judge.** On September 10, 2003, appellee Michael Malouf ("Malouf") was charged in Count One of a two-count indictment with conspiracy to distribute, and to possess with intent to distribute, five kilograms or more of cocaine and an unspecified amount of marijuana, in violation of 21 U.S.C. §§ 841 (a)(1) and 846. Section 841(b)(1)(B) imposes upon a defendant with a prior felony conviction a mandatory minimum sentence of ten years for offenses involving 500 grams or more of a substance containing cocaine. On May 28, 2004, Malouf pled guilty to the indictment, but he reserved the right to contest the amount of drugs specifically attributable to him. At sentencing, the court found that the government had proved by a fair preponderance of the evidence that Malouf was responsible for more than 500 grams of cocaine. However, the court found that the government had not proved its case beyond a reasonable doubt. Because the district court found that a fact that triggers a mandatory minimum sentence must be proved beyond a reasonable doubt, the judge sentenced Malouf to 60 months' imprisonment. After careful consideration, we reverse.

**I.**

In 2001, the Federal Bureau of Investigation ("FBI") undertook an investigation of drug trafficking in the South Shore area of Massachusetts. Stephen Nicholson ("Nicholson") was one of the initial targets of the investigation and he would ultimately be one of Malouf's co-defendants. Between April 14 and June 13

2002, the government intercepted Nicholson's telephone calls. The wiretap surveillance revealed that Nicholson was selling ounce quantities of cocaine to various buyers and that Malouf was his primary customer. The government also conducted physical surveillance of Nicholson and Malouf, among others.

At the change of plea hearing on May 28, 2004, Malouf pled guilty to the charge of conspiracy to distribute, and to possess with intent to distribute, five kilograms or more of cocaine and a quantity of marijuana in violation of §§ 841(a)(1) and 846. The government described the minimum applicable penalty as follows: "because the defendant has a prior felony drug conviction and an 851 information[1] has been filed, if he's found accountable for 500 grams or more of cocaine he'd be subject to a ten-year minimum mandatory sentence and a minimum mandatory eight-year term of supervised release." Malouf admitted that he had conspired with Nicholson and others to distribute cocaine and marijuana, and he agreed that the conspiracy-wide total drug weight exceeded 500 grams. However, he notified the court of his intention to contest the quantity of drugs specifically attributable to him at sentencing.

At the sentencing hearing on December 20, 2004, Malouf's counsel again indicated that he

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[1] 21 U.S.C. § 851 provides that, where the government seeks to establish prior convictions for the purpose of increasing the applicable criminal penalties for a drug offense under § 841, the proper procedure is as follows:

> No person who stands convicted of an offense under this part shall be sentenced to increased punishment by reason of one or more prior convictions, unless before trial, or before entry of a plea of guilty, the United States attorney files an information with the court (and serves a copy of such information on the person or counsel for the person) stating in writing the previous convictions to be relied upon.

21 U.S.C. § 851(a)(1).

intended to contest certain of the alleged cocaine transactions. The court then directed both parties to submit memoranda identifying the contested transactions and establishing their competing interpretations of the relevant intercepted telephone calls.

On January 27, 2005, the government submitted a Corrected Sentencing Memorandum and chart alleging that Malouf participated in eighteen separate cocaine transactions involving approximately 20.5 ounces (581 grams) of cocaine during, or immediately prior to, the wiretap period. Malouf contested four of the eighteen transactions. At the sentencing hearing on March 15, 2005, Malouf first contested an alleged two-ounce (56.7-gram) transaction that occurred two days prior to the April 14, 2002, commencement of the wiretap period. Malouf challenged this transaction solely on the ground that it fell outside of the wiretap period. Because the court found that Malouf was not challenging the drug quantity or the government's interpretation of the telephone calls referring to the transaction, the court dismissed Malouf's objection.

Next, Malouf contested an alleged one-ounce (28.35-gram) transaction on April 25 and another on April 27 on the ground that there was insufficient evidence that they actually transpired. The court agreed that the evidence was insufficient to prove either transaction, resulting in a 56.7-gram reduction of the total drug quantity attributable to him.

Finally, Malouf challenged the alleged June 11 one-ounce (28.35-gram) transaction. Although Malouf did not contest the government's interpretation of a telephone conversation on that date in which he and Nicholson discussed a cocaine transaction that was to take place later that day, he argued that "there's no evidence that the meeting ever happened." The government urged the court to infer that the meeting took place because there were "no other phone calls afterward indicating that it did not take place."

Because it was clear that the applicability of the ten-year mandatory minimum would turn on the court's determination as to the June 11 transaction, the court continued the sentencing hearing and invited both parties to provide additional evidence.

When the sentencing hearing resumed on March 23, 2005, neither party presented new evidence as to the June 11 transaction. The critical issue was whether the appropriate legal standard by which to judge a fact triggering a mandatory minimum sentence was beyond a reasonable doubt or by a fair preponderance of the evidence. The court determined that "facts which determine a mandatory minimum ought to go before a jury," or, if both parties agree to waive a jury trial, the sentencing judge "stands in the shoes of the jury, and the standard is beyond a reasonable doubt." The government objected on the ground that "there's no right under the Sixth Amendment, the due process clause or any other source of law to a jury trial or beyond a reasonable doubt standard with respect to any sentencing fact, the determination of which would result in a sentence below the statutory maximum." When the court dismissed the government's objection, the government agreed to waive any jury trial right.

The court determined that although it would find that the June 11 transaction had occurred as alleged if the applicable standard was a fair preponderance of the evidence, it "could not conclude beyond a reasonable doubt" that the transaction had in fact taken place. As a result, the court declined to hold Malouf accountable for the one ounce (28.35 grams) he allegedly purchased in the June 11 transaction. The court thus concluded that Malouf was accountable for a total of only 17.5 ounces (496.125 grams). Because the total was less than 500 grams of cocaine, the ten-year mandatory minimum sentence did not apply. Malouf's base offense level was 26, and the court reduced it to 23 for acceptance of responsibility. Malouf's criminal history category was

IV, but the court brought it down to III because "at least two points of the criminal history derived from [his] addiction problems." The guidelines sentencing range was 57 to 71 months, and the court sentenced Malouf to 60 months' imprisonment and a six-year term of supervised release.

On June 14, 2005, the district court issued a written opinion addressing four separate issues pertaining to the sentencing of Malouf. United States v. Malouf, 377 F. Supp. 2d 315 (D. Mass. 2005). Explaining the logic underlying Malouf's sentence, the district court asked,

> (1) Do the drug quantities outlined in 21 U.S.C. § 841 comprise elements of offenses, or sentencing factors? If the former, the relevant case is Apprendi, a jury trial is required and the standard of proof is beyond a reasonable doubt; if the latter, it is Harris, drug quantity can be determined by a judge, and the standard is a fair preponderance of the evidence. (2) What is the continued efficacy of Harris in the light of the Court's rulings in Blakely and Booker? (3) What is a district court to do when the First Circuit's interpretation of § 841 relies on Supreme Court precedent which predates Blakely and Booker? (4) In the alternative, however the facts are characterized (as sentencing factors or elements), where facts have a significant, indeed determinative impact, does the Due Process Clause of the Fifth Amendment require the application of the beyond a reasonable doubt standard?

Id. at 317.

As to the first issue, the court found that "§ 841 is an offense-defining statutory provision, all elements of which must be tried before the jury." Id. at 328. As to the second question, the district court determined that "the breadth of the holdings in Booker and Blakely have in fact overruled Harris." Id. at 326. With regard to the third issue, although the court acknowledged that our decision in United States v. Goodine, 326 F.3d 26 (1st Cir. 2003) required a different result, it determined that Goodine was not binding because of its "reliance on Supreme Court precedent which is crumbling." Id. at 325. Finally, as to the due process issue, the court found that quantity must be proved beyond a reasonable doubt "[i]f a substantial sentence hinges on a finding of a specific quantity" because in such cases courts "should have a high degree of confidence in this finding." Id. at 329.

**II.**

The government argues on appeal that the district court erred by refusing to impose on Malouf a ten-year mandatory minimum sentence under 21 U.S.C. § 841(B)(1)(b) despite finding by a preponderance of the evidence that he was accountable for more than 500 grams of cocaine. The government challenges only the district court's legal determinations, which we review de novo. Goodine, 326 F.3d at 27.

**A. Harris**

The government first contests the district court's conclusion that the Supreme Court's decisions in United States v. Booker and Blakely v. Washington overruled its earlier opinions in Harris v. United States and McMillan v. Pennsylvania.

**1. Relevant Precedent**

We begin with a brief discussion of relevant Supreme Court precedent. In McMillan v. Pennsylvania, the Court sustained a statute that allowed the sentencing judge to find, by a preponderance of the evidence, a fact that increased the minimum penalty for a crime. 477 U.S. 79, 79 (1986). In McMillan, the Court distinguished between offense elements, which must be proved beyond a reasonable doubt, and sentencing factors, which may be proved by a preponderance of the evidence. Id. at 91. In Apprendi v. New Jersey, the Court held that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. 466, 490 (2000) (emphasis added). Two years later in Harris, the Court held that Apprendi did not apply to facts that increase the mandatory minimum sentence and reaffirmed McMillan. 536 U.S. 545, 545 (2002) (emphasis added). In Blakely v. Washington, the Court found unconstitutional a state trial court's imposition of a sentence that was above the statutory maximum, on the basis of the judge's finding of fact. 542 U.S. 296, 305 (2004). The Blakely court held that "the 'statutory maximum' for Apprendi purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." Id. at 303. Finally, in United States v. Booker, the Court held that the reasoning of Blakely should be applied to the Federal Sentencing Guidelines. 543 U.S. 220, 226-27 (2005).

**2. The district court's analysis**

The district court in the case before us reasoned that Blakely and Booker actually "broadened Apprendi by requiring that all facts 'which the law makes essential to the punishment' be subject to Sixth Amendment protections." Malouf, 377 F. Supp. 2d at

324. The judge determined further that Blakely and Booker evince the Court's movement toward an "impact test" that focuses more on "the impact of such facts upon punishment, rather than on the formalistic distinctions between sentencing factors and offense elements." Id. According to the district court, this "impact test" approach "necessarily casts doubt on Harris' distinction between mandatory minimum provisions and statutory maximums." Id. Ultimately, the court concluded, "[i]n my judgment, the breadth of the holdings in Booker and Blakely have in fact overruled Harris. The Court has gone from holding that the Sixth Amendment is implicated in the determination of facts that increase a statutory maximum (Apprendi) to applying the Sixth Amendment to all facts 'essential to the punishment' (Booker and Blakely)." Id. at 326 (footnote omitted).

We need not delve deeper into the district court's analysis because, since its opinion issued on June 14, 2005, we have had cause to consider the continued vitality of Harris in light of subsequent Supreme Court case law. Approximately ten months after the district court decided Malouf, we decided the case of United States v. Lizardo, in which we held that "Booker left intact the Supreme Court's precedent in Harris, which allowed the use of judicially found facts to increase a mandatory minimum sentence." 445 F.3d 73, 90 (1st Cir. 2006).

**B. Goodine**

The district court concluded that even if Harris remains good law, § 841 "is an offense-defining statutory provision, all elements of which must be tried before the jury." Malouf, 377 F. Supp. 2d at 328. This finding is directly contrary to -- and foreclosed by -- Goodine in which we held that "drug quantity for purposes of § 841 is a sentencing factor that may be determined by a preponderance of the evidence." 326 F.3d at 32. Goodine was decided after Apprendi and

Harris but before Booker and Blakely. The district court found that it was not bound by Goodine because that opinion was based on Supreme Court precedent "which is crumbling." Malouf, 377 F. Supp. 2d at 325. As we have since held in Lizardo, we are bound by Goodine. Lizardo, 445 F.3d at 90.

We tarry here to reaffirm that there are only two exceptions to the principle that newly constituted panels are bound by decisions of prior panels in the same circuit. As to the first, "[a]n existing panel decision may be undermined by controlling authority, subsequently announced, such as an opinion of the Supreme Court, an en banc opinion of the circuit court, or a statutory overruling." United States v. Guzmán, 419 F.3d 27, 31 (1st Cir. 2005) (citation and internal quotation marks omitted). With regard to the second exception which "operates in instances that fairly may be described as hen's-teeth rare, authority that postdates the original decision, although not directly controlling, may nevertheless offer a compelling reason for believing that the former panel, in light of new developments, would change its collective mind." Id. Neither exception applies in this case. As we discussed in the previous section, Harris remains good law after Blakely and Booker, and there is no other reason for us to contravene our own precedent. Goodine is binding on this circuit and the district court erred when it concluded otherwise.

**C. Due Process**

The district court made an alternative finding that even if drug quantity is a sentencing factor under § 841, it must be proven beyond a reasonable doubt because of the protections afforded by the due process provision of the Fifth Amendment. Citing a "new concern for procedural fairness in the finding of facts," the district court held that "[i]f a substantial sentence hinges on a finding of a specific quantity, then . . . I (and the public) should have a high degree of

confidence in this finding," and thus the quantity finding must be proved beyond a reasonable doubt. Malouf, 377 F. Supp. 2d at 329.

The district court's analysis and conclusion are foreclosed by the Supreme Court's decision in McMillan. In that case, the Court considered the constitutionality of a Pennsylvania statute that required a sentencing court to impose a five-year minimum sentence if it found by a preponderance of the evidence that the defendant "visibly possessed a firearm" during the commission of certain enumerated offenses. 477 U.S. at 81. McMillan held that due process did not require visible possession of a firearm to be treated as an element of the offense that must be proved beyond a reasonable doubt. The Court noted that "sentencing courts have always operated without constitutionally imposed burdens of proof" and that the visible possession requirement, despite triggering a mandatory minimum penalty, did not implicate the Due Process Clause because it "neither alters the maximum penalty for the crime committed nor creates a separate offense calling for a separate penalty." Id. at 92 n.8, 87-88. The same is true here with respect to drug quantity, insofar as it determines the mandatory minimum sentence.

**III.**

For the foregoing reasons, we reverse the district court's decision and remand for sentencing in accordance with this opinion.

**Reversed and remanded**

**APPENDIX D**

AO 245B Sheet 1 – Judgment in a Criminal Case – D. Massachusetts (03/02)

**United States District Court**
**District of Massachusetts**

UNITED STATES OF AMERICA
v.
**Michael Malouf**

**JUDGMENT IN A CRIMINAL CASE**
(For Offenses Committed On or After November 1, 1987)

**Case Number 1: 03 CR 10298 – NG – 06**

Frank J. McGee
Defendant's Attorney

☐ Reduction of Sentence for Changed Circumstances (Fed R Crim P35(b))

**THE DEFENDANT:**

☒pleaded guilty to count(s): 1

☐pleaded nolo contendere to counts(s) _____ which was accepted by the court.

☐was found guilty on count(s) _____ after a plea of not guilty.

Accordingly, the court has adjudicated that the defendant is guilty of the following offense(s):

| Title & Section | Nature of Offense | Date Offense Concluded | Count Number(s |
|---|---|---|---|
| 21USC§846 | Conspiracy to Possess with Intent to Distribute a Controlled Substance | 07/31/03 | 1 |

□See continuation page

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

□ The defendant has been found not guilty on counts(s) _____ and is discharged as to such count(s).

□ Count(s) _____ is dismissed on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant shall notify the court and United States Attorney of any material change in the defendant's economic circumstances.

03/23/05

s/Nancy Gertner
Signature of Judicial Officer

The Honorable Nancy Gertner
Name and Title of Judicial Officer

Judge, U.S. District Court

Date
6/15/05

Defendant's Soc. Sec. No.: 000-00-6063

Defendant's Date of Birth 00/00/1966

Defendant's USM No. 24857-038

Defendant's Residence Address:

Plymouth County House of Correction
Plymouth, MA 02362

Defendant's Mailing Address:

1431 Ocean Street
Marshfield, MA 02050

AO 245B Sheet 1 – Judgment in a Criminal Case – D. Massachusetts (03/02)

CASE NUMBER: **1: 03 CR 10298 – NG – 06**
DEFENDANT: **Michael Malouf**
Judgment – Page 2 of 6

**IMPRISONMENT**

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 60 month(s) on count 1.

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:
☐ at _____ on _____
☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:
- ☐ before _____ on _____
- ☐ as notified by the United States Marshal.
- ☐ as notified by the Probation or Pretrial Services Officer.

**RETURN**

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
Deputy U.S. Marshal

CASE NUMBER: **1: 03 CR 10298 – NG – 06**
DEFENDANT: **Michael Malouf**
Judgment – Page 3 of 6

**SUPERVISED RELEASE**

Upon release from imprisonment, the defendant shall be on supervised release for a term of 6 year(s)

☒ See continuation page

The defendant shall report to the probation office in the district to which the defendant is released within

72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not illegally possess a controlled substance.

*For offenses committed on or after September 13, 1994:*

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

☐ The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse. (Check if applicable.)

☒ The defendant shall not possess a firearm, destructive device, or any other dangerous weapon.

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page (if indicated above).

## STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
2)the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4) the defendant shall support his or her dependants and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training or other acceptable reasons;
6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment
7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;
10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law

enforcement agency without the permission of the court;
13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

CASE NUMBER: **1: 03 CR 10298 – NG – 06**
DEFENDANT: **Michael Malouf**
Judgment – Page 4 of 6

**Continuation of Conditions of ☒ Supervised Release ☐ Probation**

The defendant is prohibited from possessing a firearm or other dangerous weapon.

The defendant is to participate in a program from substance abuse as directed by the US Probation Officer, which program may include testing, not to exceed 104 drug tests per year, to determine whether the defendant has reverted to the use of alcohol or drugs. The defendant shall be required to contribute to the costs of services for such treatment based on the ability to pay or availability of third party payment.

The defendant is to participate in a mental health program as directed by the United States Probation Office. The defendant shall be required to contribute to the costs of services for such treatment based on the ability to pay or availability of the third party payment.

The defendant is to cooperate in the collection of the DNA as directed by the United States Probation Officer.

The defendant is not to consume any alcoholic beverages.

CASE NUMBER: **1: 03 CR 10298 – NG – 06**
DEFENDANT: **Michael Malouf**
Judgment – Page 5 of 6

**CRIMINAL MONETARY PENALTIES**

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5, Part B.

| | **Assessment** | **Fine** | **Restitution** |
|---|---|---|---|
| TOTALS | $100.00 | | |

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

☐ The defendant shall make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid in full prior to the United States receiving payment.

| Name of Payee | *Total Amount of Loss | Amount of Restitution Order | Priority Order or Percentage of Payment |
|---|---|---|---|
| | | | ☐ See Continuation Page |
| TOTALS | | $0.00 | $0.00 |

☐ If applicable, restitution amount ordered pursuant to plea agreement _____

☐ The defendant shall pay interest on any fine or restitution of more than $2,500, unless the fine or restitution is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 5, Part B may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest, and it is ordered that:

☐ the interest requirement is waived for the
☐ fine and/or ☐ restitution.
☐ the interest requirement for the
☐ fine and/or ☐ restitution is modified as follows:

*Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18, United States Code, for offenses committed on or after September 13, 1994 but before April 23, 1996.

CASE NUMBER: **1: 03 CR 10298 – NG – 06**
DEFENDANT: **Michael Malouf**
Judgment – Page 6 of 6

**SCHEDULE OF PAYMENTS**

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties shall be due as follows:

A ☐ Lump sum payment of _____ due immediately, balance due

☐ not later than _____, or
☐ in accordance with ☐C, ☐D, or ☐E below; or

B ☒ Payment to begin immediately (may be combined with C, D, or E below); or

C ☐ Payment in _____ (e.g., equal, weekly, monthly, quarterly) installments of _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or

D ☐ Payment in _____ (e.g., equal, weekly, monthly, quarterly) installments of _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E ☐ Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment, payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary

penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court, unless otherwise directed by the court, the probation officer, or the United States attorney.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Case Number, Defendant Name, and Joint and Several Amount:

☐ See Continuation Page

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) community restitution, (6) fine interest (7) penalties, and (8) costs, including cost of prosecution and court costs.

AO 245B Judgment in a Criminal Case – D. Massachusetts Statement of Reasons – Sheet 1

**UNITED STATES DISTRICT COURT**
**District of Massachusetts**

UNITED STATES OF AMERICA
**V.**
Michael Malouf

**STATEMENT OF REASONS**

**Case Number 1: 03 CR 10298 – NG – 06**

Frank McGee
Defendant's Attorney

☐ The court adopts the factual findings and guideline application in the presentence report.

**OR**

☒ The court adopts the factual findings and guideline application in the presentence report, except (see attachment, if necessary):

See sentencing memorandum.

☐ See Continuation Page

**Guideline Range Determined by the Court:**

| | |
|---|---|
| Total Offense Level: | 23 |
| Criminal History Category: | IV |
| Imprisonment Range: | 70 to 87 months |
| Supervised Release Ranger: | 3 to 6 years |
| Fine Range: | $10,000.00 to $ 2,000,000.00 |

03/23/05
Date of Imposition of Judgment

s/Nancy Gertner
Signature of Judicial Officer

The Honorable Nancy Gertner
Judge, U.S. District Court
Name and Title of Judicial Officer

6/15/05
Date

Defendant's Soc. Sec. No.: 000-00-6063

Defendant's Date of Birth: 1966

Defendant's USM No.: 24857-038

Defendant's Residence Address:

Plymouth House of Correction
Plymouth, MA 02361

Defendant's Mailing Address:

1431 Ocean Street
Marshfield, MA 02050

DEFENDANT: Michael Maloug
CASE NUMBER: **1: 03 CR 10298 - NG - 06**

**STATEMENT OF REASONS**

☒ Fine waived or below the guideline range because of inability to pay.
Total Amount of Restitution: $ _____

☐ Discretionary restitution is not ordered because the complication and prolongation of the sentencing

process resulting from the fashioning of a restitution order outweighs the need to provide restitution to any victims, pursuant to 18 U.S.C. § 3663(a)(B)(ii) (or in offenses committed before April 23, 1996, pursuant to 18 U.S.C. § 3663(d)).

☐ Restitution pursuant to the mandatory victim restitution provisions is not ordered in this title 18 property offense because the number of identifiable victims is so large as to make restitution impracticable, pursuant to 18 U.S.C. § 3663A(c)(3)(A).

☐ Restitution pursuant to the mandatory victim restitution provisions is not ordered in this title 18 property offense because determining complex issues of fact and related to the cause of amount of the victim's losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim is outweighed by the burden on the sentencing process, pursuant to 18 U.S.C. § 3663A(c)(3)(B).

☐ For offenses committed on or after September 13, 1994 but before April 23, 1996 that require the total amount of loss to be stated, pursuant to Chapters 109A, 110, 110A, and 113A of Title 18, restitution is not ordered because the economic circumstances of the defendant do not allow for the payment of any amount of a restitution order, and do not allow for the payment of any or some portion of a restitution order in the foreseeable future under any reasonable schedule of payments.

☐ Partial restitution is ordered, pursuant to 18 U.S.C. § 3553(c), for the following reason(s):

DEFENDANT: Michael Maloug
CASE NUMBER: **1: 03 CR 10298 - NG - 06**

**STATEMENT OF REASONS**

☐ The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to department from the sentence called for by the application of the guidelines.

**OR**

☐ The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reasons:

**OR**

☒ The sentence departs from the guideline range:

☐ upon motion of the government, as a result of a defendant's substantial assistance, or

☒ for the following specific reason(s):

See sentencing memorandum.

☐ See Continuation Page

**APPENDIX E**

**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF MASSACHUSETTS**

| | |
|---|---|
| UNITED STATES OF AMERICA, | ) |
| | ) CRIM. NO. |
| v. | ) 03-cr-10298-NG |
| | ) |
| MICHAEL MALOUF, | ) |
| Defendant. | ) |
| | ) |

GERTNER, D.J.

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**June 14, 2005**


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**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF MASSACHUSETTS**

| | |
|---|---|
| UNITED STATES OF AMERICA, | ) |
| | ) CRIM. NO. |
| v. | ) 03-cr-10298-NG |
| | ) |
| MICHAEL MALOUF, | ) |
| Defendant. | ) |
| | ) |

GERTNER, D.J.

**SENTENCING MEMORANDUM**
**June 14, 2005**

This case is about the interpretation of an important federal drug distribution statute, 21 U.S.C. § 841, under which the defendant Michael Malouf ("Malouf") was indicted. Section 841 creates a staircase of sentences, with steep increases at each step — statutory maximums up to life imprisonment and mandatory minimums that increase from five, to ten, and to twenty years. Where the defendant is situated on this sentencing staircase depends upon the type and quantity of drugs involved, whether the defendant has a prior felony drug conviction, and whether death or bodily injury resulted from the offense.

The interpretation *of* the statute is complicated by recent changes in Supreme Court sentencing law, embodied by Blakely v. Washington, 124 5. Ct. 2531 (2004), United States v. Booker, 125 S. Ct. 738 (2005), and Shepard v. United States, 125 S. Ct. 1254 (2005) . This law substantially impacts the application of each factor in the statute - in particular, prior convictions (implicating Almendarez-Torres v. United States, 523 U.S. 224 (1998)), bodily injury (implicating Jones v. United States, 526 U.S. 227 (1999), and drug quantity - that increases the statutory maximum penalty

(implicating Apprendi v. New Jersey, 530 U.S. 466 (2000)), and/or the mandatory minimums (implicating Harris v. United States, 536 U.S. 545 (2002)). The question is whether, as the Supreme Court's decisional law has changed, the interpretation of 21 U.S.C. § 841 should likewise change.

Specifically, the sentencing of Michael Malouf raises the following questions: (1) Do the drug quantities outlined in 21 U.S.C. § 841 comprise elements of offenses, or sentencing factors? If the former, the relevant case is Apprendi, a jury trial is required and the standard of proof is beyond a reasonable doubt; if the latter, it is Harris, drug quantity can be determined by a judge, and the standard is a fair preponderance of the evidence. (2) What is the continued efficacy of Harris in the light of the Court's rulings in Blakely and Booker? (3) what is a district court to do when the First Circuit's interpretation of § 841 relies on Supreme Court precedent which predates Blakely and Booker? (4) In the alternative, however the facts are characterized (as sentencing factors or elements), where facts have a significant, indeed determinative impact, does the Due Process Clause of the Fifth Amendment require the application of the beyond a reasonable doubt standard?

On September 10, 2003, Michael Malouf[1] was charged with conspiracy to distribute five kilograms or more of cocaine, as well as a quantity of marijuana, in violation of 21 U.S.C. §5 846, 841(a)(1), (b)(1)(A)(ii).[2] In addition, the government gave notice (under 21 U.S.C. § 851(a)) that it would rely on a prior felony drug offense as the basis for a sentencing enhancement.[3] The prior conviction, together with the quantity of cocaine alleged in the indictment, exposed the defendant, if convicted, to twenty years to life imprisonment. See 21 U.S.C. § 841(b)(1)(A).

On May 28, 2004, Malouf pled guilty to the indictment, but not to all of its terms. (There was no plea agreement) Malouf, with the government's approval, reserved the right to contest the amount of drugs specifically attributable to him.

The government's position was straightforward: So long as the final sentence was less than life imprisonment (the "5 kilograms or more" statutory maximum) - as it was bound to be - the Court was

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[1] Malouf was indicted along with Frederick Joseph Martineau ("Martineau") Edward Ennis ("Ennis") Sabarian Taba ("Taba"), Stephen Nicholson ("Nicholson") James Sardina Jr. ("Sardina") and John Scares ("Scares") . A superceding indictment was subsequently brought against defendants Ennis, Nicholson, Sardina and Soares. As indicated in my Memorandum and Order Re: Motions to Suppress, dated February 23, 2005, I concluded that there was probable cause to believe that Martineau was supplying Nicholson with cocaine and that Nicholson in turn was supplying Sardina and Malouf. Ennis allegedly worked with Martineau in the distribution of drugs to Nicholson. Soares was another customer of the group.

Martineau was sentenced to 120 months. Scares, allegedly the least culpable, was sentenced to 24 months. The cases against the remaining defendants are still pending.

[2] The conspiracy spanned the period from April 2003, through July 2003.

[3] The qualifying charge was the defendant's 1997 conviction in Norfolk Superior Court, Docket Number 101631, for Trafficking in cocaine.

authorized to decide the quantity for which Malouf was responsible. Drug quantity, the government argued, is a sentencing factor, not an element of the offense. Accordingly, Harris authorized the Court to determine drug quantity by a fair preponderance of the evidence, even if that amount triggered a substantial mandatory minimum sentence. See 536 U.S. at 567. Since, according to the government, Malouf was responsible for over 500 grams of cocaine, and had a prior felony drug conviction, he was to be sentenced to a mandatory minimum sentence of ten years.

Malouf countered that he was responsible for under 500 grams of cocaine, an amount without a mandatory minimum. See 21 U.S.C. § 841(b)(1)(c) (where the penalty ranges from probation to thirty years); see also infra Part II.B. In such a case, the sentencing range specified in the Federal Sentencing Guidelines would guide the judge in sentencing an offender up to the statutory maximum. See United States v. Jaber, 362 F. Supp. 2d 365 (D. Mass. 2005) (describing the appropriate approach to analyzing the Guidelines post-Booker)

At sentencing hearings held over three days, I made alternative legal and factual rulings, in part to reflect the recent uncertainty in the law of sentencing: First, in order to avoid a constitutional issue, namely the question of the Harris holding's continued efficacy following Blakely and Booker, I construed 21 U.S.C. § 841 as creating three offenses; 1) an aggravated offense, namely distribution of five kilograms or more of cocaine, and two lesser offenses, 2) distribution of 500 grams or more (up to 5 kilograms) of cocaine, and 3) distribution of under 500 grams of cocaine. I concluded that, under Apprendi, the elements of each offense were to be determined by a jury and proved beyond a reasonable doubt.

I then construed the defendant's plea as an admission to all of the elements of the indicted offense except to the drug quantity attributable to him. I

found that the defendant's reservation of the right to challenge quantity amounted to a request for a jury-waived trial on the question of whether his conduct constituted the lesser included offense (under 500 grams) or the higher offense (over 500 grams). If the government agreed with the jury waiver,[4] the issue would be tried to the Court, subject to the beyond a reasonable doubt standard.

The government vigorously objected. Nevertheless, while preserving its objections to the Court's construction of 21 U.S.C. § 841 as three offenses, the government agreed to waive the jury with respect to the determination of quantity.

Alternatively, I found that, even if the drug quantities enumerated in 21 U.S.C. § 841 comprised sentencing factors to be determined by the Court under Harris, I would still apply the highest burden of proof to the facts at bar. If the Sixth Amendment's jury trial right was not implicated under Apprendi, then at the very least, the Fifth Amendment's Due Process protections should have been triggered. Even *if* the full formality of a jury were not required, at the very least, the "beyond a reasonable doubt" standard was required. See Judge Nancy Gertner, What Has *Harris* Wrought, 15 Fed. Sent. Rep. 83, *1 (2002).

I also made two alternative factual findings. First, I found that the government had not proved beyond a reasonable doubt defendant's alleged distribution of over 500 grams of cocaine. As such, I sentenced the defendant under the Federal Sentencing Guidelines (as described below). Second, should the First Circuit analyze the burden of proof issue differently, I noted that I would have found the amount of cocaine to be over 500 grams by a fair preponderance of the evidence. Under this alternative paradigm, the defendant's sentence would have been 120 months, the mandatory minimum.

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[4] Waiver of the jury required an agreement by both the government and the defendant under Rule 23(a).

Based on my review of the evidence, and my primary use of the beyond a reasonable doubt standard, I found that the government had not proven the completion of three cocaine transactions, on April 25, 2003, April 27, 2003, and June 11, 2003. As a result, I concluded that the amount of cocaine distributed was under 500 grams, and applied the Sentencing Guidelines with a one-level departure on criminal history grounds. I sentenced Malouf to 60 months' imprisonment, with a number of specific conditions designed to address his severe drug abuse problem.

## I. FACTS

### A. Procedural Background

On May 28, 2004, Malouf pleaded guilty to *a* one count indictment charging him with conspiracy to distribute and to possess with intent to distribute, five kilograms or more of cocaine, and a quantity of marijuana in violation of 21 U.S.C. §§ 846, 841(a)(1), (b)(1)(A). At the rule 11 hearing, Malouf admitted that he conspired with Nicholson and others to distribute cocaine and marijuana and that a number of these drug transactions were documented in phone calls intercepted over Nicholson's phone.[5] He also admitted that the conspiracy involved five kilograms or more of cocaine under 21 U.S.C. § 841(a)(1).

Malouf, however, did not admit the specific quantity of drugs for which he was to be held responsible, stating (through his counsel) that he would be "contesting [at the sentencing hearing] whether or not it's over or under 500 grams." The government agreed that this issue was appropriately preserved for sentencing.

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[5] One marijuana transaction on April 29, 2003, did not contribute to the mandatory minimum issue but was considered in the total Guidelines calculation.

**B. Evidence**

The government submitted an affidavit, which effectively comprised Special Agent Michael Kozak's ("Kozak") direct examination. Based on Kozak's affidavit, which quoted extensively from wiretapped conversations, the government argued that Malouf was responsible for 31.5 ounces of cocaine and four pounds of marijuana. The 31.5 ounces of cocaine consisted of 11 ounces purchased before the wiretap period, offered through the testimony of a confidential informant, and 20.5 ounces allegedly purchased during the 60-day wiretap period. Subsequently, the government withdrew allegations concerning amounts purchased before the wiretap period in order to protect the identity of its confidential informant.

The government then focused on evidence gleaned from the overheard conversations and to a degree, contemporaneous surveillance of the defendants. Like many defendants, Malouf and his co-conspirators spoke in a sort of code; the government (largely through the AUSA) offered its own "translations,"[6] which for the most part were not contested.

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[6] Kozak's affidavit consisted of a transcript of the wiretapped phone calls from a cell phone subscribed to and used by Nicholson. (At various times during April 2003, through July 2003, the FBI conducted court-ordered electronic surveillance of the phones of Nicholson, Sardina and Martineau). The affidavit quoted the relevant code language and, in brackets, included Agent Kozak's interpretations of the statements. During a hearing on motions to suppress filed by the other defendants, I learned that the prosecutor provided these interpretations of the phone conversations - not Agent Kozak. Agent Kozak later reviewed the prosecutor's interpretations and apparently adopted them. As I indicated in my Memorandum and Order Re: Motions to Suppress, dated February 23, 2005, "I am very troubled that the prosecutor is providing the interpretations that should be based on the agents' independent training and experience in drug investigations." Mem. at 5 n.6. I indicated that I would accept

Malouf did not contest the allegation that he purchased cocaine and marijuana during the wiretap period. Nor did he contest the specifics of most of the transactions in which a price (or a fairly transparent code for a price) clearly was mentioned, and followed by surveillance confirming that the deal was consummated. He did, however, contest some of the inferences the government sought to draw from the conversations. In three instances, I agreed with Malouf's objections, based on my understanding of the appropriate burden of proof, to which I now turn.

## II. BURDEN OF PROOF

### A. Sixth Amendment Rights Under *Apprendi* and *Harris*

As described above, this case is about the construction of the federal drug distribution statute, 21 U.S.C. § 841. It implicates the Supreme Court's methodology in interpreting criminal statutes in cases like McMillan v. Pennsylvania, 477 U.S. 79 (1986), Jones, Apprendi, Harris, and to a degree, its more recent jurisprudence in Blakely, Booker and Shepard.

In Apprendi, the court held, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed *statutory maximum* must be submitted to a jury, and proved beyond a reasonable doubt." Apprendi, 530 U.S. at 490 (emphasis added). Apprendi pled guilty to two

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those interpretations ultimately adopted by the investigating agents under oath, and found that - in the case of the specific transcribed conversations at issue in that proceeding - the interpretations seemed reasonable based on my review of the materials.

In the Malouf sentencing, after critically examining three conversations interpreted by the government through agent Kozak, I determined that the evidence was deficient when measured by the reasonable doubt standard.

counts of unlawful possession of a firearm and one count of unlawful possession of an antipersonnel bomb. See id. at 470. Under state law, the maximum sentence was ten years on each of the first two counts, or twenty years total.[7] See id.

The prosecutor asked for a sentencing enhancement under a separately codified New Jersey hate crime law. See State v. Apprendi, 304 N.J. Super. 147, 150 (1997) (citing N.J. STAT. ANN. § 2C:44-3 (e), which authorizes enhanced sentences for defendants that commit crime "with a purpose to intimidate [] an individual or group of individuals because of race"). The enhancement increased *both* the maximum and the minimum term to which the defendant was subject for possession of a firearm, from five to ten years to ten to twenty years, and for possession of an antipersonnel bomb, from three to five years to five to ten years. See id.; Apprendi, 530 U.S. at 470. The state judge found the relevant state of mind by a preponderance of the evidence and sentenced Apprendi to 12 years on the first count, and shorter concurrent sentences on the other two counts. See Apprendi, 530 U.S. at 471. The Supreme Court reversed.

To the Court, it did not matter how the legislature characterized the hate crime enhancement - as a sentencing factor or an element; so long as the enhancement had the effect of increasing the statutory maximum for the offense, it had to be found by a jury.[8] Nevertheless, in the immediate aftermath of

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[7] The maximum sentence was five years on the third count, but the plea agreement provided that this sentence would run concurrently with the other two sentences. See Apprendi, 530 U.S. at 470.

[8] Apprendi was presaged by the Supreme Court's decision in Jones, interpreting the federal carjacking statute, 19 U.S.C. § 2119. See 526 U.S. at 229. In Jones, a jury convicted the defendant under 18 U.S.C. § 924(c) and 18 U.S.C. § 2119, which included a sentencing provision that spelled out the elements of the offense. See id. at 230. That provision increased the maximum

Apprendi, its scope was not clear:[9] Would Apprendi apply only to factors that increase statutory

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sentence from 15 to 25 years "if serious bodily injury . . . result[ed]." Id. (quoting 18 U.S.C. § 2119(2) (1988 ed., Supp. V)). Neither the indictment nor the jury verdict mentioned "serious bodily injury." See id. at 230-31. Nonetheless, the judge concluded that "serious bodily injury" had occurred and thereby increased the defendant's sentence to 25 years. See id. at 231.

The Supreme Court reversed, finding "serious bodily injury" to be an element of the offense and not a sentencing factor. It characterized its decision as one of statutory interpretation, but noted that "grave and doubtful constitutional questions" would be raised by any other interpretation. Id. at 239 (quoting United States ex rel. Attorney General v. Delaware & Hudson Co., 213 U.S. 366, 408 (1909)).

[9] In United States v. Wilkes, 130 F. Supp. 2d 222, 231 (D. Mass. 2001), I noted that there are "[t]hree currents" of constitutional analysis in Apprendi. I described them as follows:

(1) The impact analysis: This approach suggests that, if the factor at issue has a substantial impact on the sentence, it must be considered an "element" of the offense. See id. It is reflected in Justice Thomas' concurrence in Apprendi:

> [I]f the legislature defines some core crime and then provides for increasing the punishment of that crime upon a finding of some aggravating fact--of whatever sort, including the fact of a prior conviction--the core crime and the aggravating fact together constitute an aggravated crime, just as much as grand larceny is an aggravated form of petit larceny. The aggravating fact is an element of the aggravated crime.

Id. (quoting Apprendi, 120 S. Ct. 2348, 2368-69 (2000) (Thomas, J., concurring)).

(2) The statutory analysis: The linchpin under this approach is what the statute itself describes--an offense element or a sentencing factor. See id. at 231-32. Throughout the Apprendi opinion, the Court repeated the holding that, other than the fact of a prior conviction, any fact that increases the prescribed statutory maximum penalty must be submitted to a jury and proven beyond a reasonable doubt. See id. at 232. The limitation on the statutory analysis approach, as noted by Justice Breyer, is that legislatures

maximums? Would it apply to any factors that have an impact on the sentencing outcome?[10] Would it apply only to traditional offense factors, as opposed to traditional sentencing factors, like prior convictions?

In Harris, it appeared the Court would limit Apprendi solely to factors that increase the statutory maximum. The Court also acknowledged certain important exceptions to the Apprendi principle. For example, where mandatory minimums, or "traditional" sentencing factors like prior convictions in Almendarez-Torres v. United States, 523 U.S. 224 (1998), were at issue, a judge could make findings in lieu of a jury. See Harris, 536 U.S. at 553, 557.

Harris involved a single statute: 18 U.S.C. § 924(c)(1)(A). See id. at 550. For carrying a firearm, the mandatory minimum was five years; for brandishing it, the mandatory minimum increased to seven years. See id. at 550-51. Although Harris was "only" convicted by a jury of "carrying" a firearm, the judge found him guilty of "brandishing" and sentenced him to seven years. See id. at 551.

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may avoid Apprendi's jury protections by returning to an indeterminate sentencing scheme. See id. (citing Apprendi, 120 S. Ct. at 2399-2402 (Breyer, J., dissenting).

(3) The third approach suggests that there are certain traditional sentencing factors and certain traditional substantive factors. For example, the court noted that recidivism is a traditional sentencing factor. See id. (citing Apprendi, 120 S. Ct. at 2362-63; Almendarez-Torres v. United States, 523 U.S. 224, 247 (1998)).

In Apprendi, the Supreme Court did not clearly reconcile the three approaches outlined above. The hate crime statute violated the defendant's rights under all three approaches.

[10] Justice Thomas in concurrence and Justices O'Connor and Breyer in dissent noted that the logical extension of the majority's position was to factors that increase the range of penalties to which the defendant was subject. See 530 U.S. at 521-22 (Thomas, J. concurring); 530 U.S. at 533 (O'Connor, J., dissenting); 530 U.S. at 563 (Breyer, J., dissenting); see also Jones, 526 U.S. at 252-53 (Stevens, J., concurring).

Justice Kennedy, joined by Justices Rehnquist, O'Connor, Scalia and Breyer, interpreted § 924(c)(1)(A) as establishing a single offense, with "brandishing" a firearm a sentencing factor akin to "traditional" sentencing factors like prior convictions. See id. at 556. In effect, the Court suggested that, as a general matter, whenever traditional sentencing factors appear in a statute, it is reasonable to assume that Congress intended them to be treated differently from offense elements - with a lesser burden of proof, and a judge, instead of a jury, as decisionmaker. Cf. Castillo v. United States, 530 U.S. 120, 126 (2000) (emphasizing that "[t]raditional sentencing factors often involve either characteristics of the offender, such as recidivism, or special features of the manner in which a basic crime was carried out (e.g., that the defendant abused a position of trust or brandished a gun).

In addition, four justices found that Apprendi applied only to facts increasing the maximum sentence, not to facts increasing the mandatory minimum sentence[11] - a holding in which Justice

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[11] The court expressly affirmed McMillan v. Pennsylvania, 477 U.S. 79 (1986). See *Harris*, 536 U.S. at 557. In McMillan, the Court characterized as a sentencing factor, rather than an element, the "visible possession of a firearm." 477 U.S. at 86-88. It upheld a statute that imposed the mandatory minimum sentence of five years where the "judge finds, by a preponderance of the evidence, that the person 'visibly possessed a firearm' during the commission of the offense." Id. at 81.

Justice Stevens dissented and in a forecast of the majority in Apprendi, argued, "if a State provides that a specific component of a prohibited transaction shall give rise both to a special stigma and to a special punishment, that component must be treated as a 'fact necessary to constitute the crime'" and be subjected to a jury trial. Id. at 103 (Stevens, J., dissenting). Congress, he maintained, cannot avoid constitutional requirements merely by declaring that certain conduct is not an element of the offense.

As one commentator described Harris, the court's ruling suggested that it was limiting the jury's function to being the

Breyer did not join. Justice Breyer wrote separately, noting that he could not distinguish Apprendi "from this case in terms of logic." Harris, 536 U.S. at 569 (Breyer, J., concurring in part and concurring in the judgment). At the same time, he reiterated his position that Apprendi was wrongly decided.

Justice Thomas dissented, joined by Justices Stevens, Souter and Ginsburg, characterizing Apprendi's holding more broadly than the decisions majority. They opined that Apprendi applies whenever a "fact exposes a defendant to greater punishment than what is otherwise legally prescribed," whether that fact "raises the floor or raises the ceiling." Id. at 579 (Thomas, J., dissenting)

### B. Section 841(b) After *Apprendi*

Section 841(b)[12] consists of three relevant subsections, each containing a sentencing range. Beginning with the most severe, § 841(b)(1)(A) imposes a mandatory minimum sentence of ten years and a maximum sentence of life when the offense involves five kilograms or more of a substance containing cocaine. The minimum sentence is increased to twenty years "if death or serious bodily injury results" or if the defendant has a previous felony drug conviction. Section 841(b)(1)(B) imposes a mandatory minimum sentence of five years and a maximum of forty years if the offense involves 500 grams or more of a substance containing cocaine. Again, death or serious bodily

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adjudicator of the "worst possible fate the defendant faces" namely, the statutory maximum, as opposed to lengthy mandatory minimum sentences short of that outer limit. Benjamin J. Priester, Structuring Sentencing: Apprendi, the Offense of Conviction, and the Limited Role of Constitutional Law, 79 Ind. L.J. 863, 876 (2004) (hereinafter Priester, Structuring Sentencing].

[12] For a general analysis, see Derrick Bingham, Note and Comment, The Meaning of Fifth and Sixth Amendment Rights: Sentencing in Federal Drug Cases After Apprendi v. New Jersey and Harris v. United States, 20 Ga. St. U. L. Rev. 723 (2004).

injury increases the mandatory minimum sentence to twenty years, and a previous felony drug conviction increases it to ten years. Finally, § 841(b)(1)(C) is the catchall provision that imposes a maximum sentence of twenty years and no minimum sentence, without specifying particular amounts for most controlled substances. The maximum is increased to thirty years with a prior felony drug conviction and the minimum is set at twenty years and the maximum at life if death or serious bodily injury results.

Prior to Apprendi, all of these factors - the amount of drugs involved in the crime, the fact of bodily injury, and the fact of previous felony drug convictions - were seen as sentencing factors found by courts. Apprendi modified this approach, but only to a degree. Most courts, including the First Circuit, construed Apprendi to require that drug quantity be treated as an element, specially charged in the indictment and submitted to the jury, whenever the enhancement takes the defendant's sentence over the applicable statutory maximum.

In United States v. Perez-Ruiz, 353 F.3d 1 (1st Cir. 2003), for example, the court held that Apprendi does not preclude judicial fact findings (including findings as to drug type and quantity) that increase a defendant's sentence under 21 U.S.C. § 841, so long as the sentence remains within the default statutory maximum. See 353 F.3d at 15. The trial court could not sentence above the default maximum unless the jury had determined the triggering drug type and quantity. See id.

A conspiracy charge, like the one at issue here (and in Perez-Ruiz), is particularly complex. The maximum sentence to which the defendant is exposed derives from the amounts found in the conspiracy (which have to be specially pleaded or found by a jury if they are above the catchall amount). See id. at 18. A judge is then obliged to sentence according to the drug amounts individually attributable to the defendant, "so long as the sentence falls within the statutory

maximum made applicable by the jury's conspiracy-wide drug quantity determination." Id. (citing Derman v. United States, 293 F.3d 34, 43 (1st Cir. 2002)); see also Edwards v. United States, 523 U.S. 511, 515 (1998) (since the court sentenced defendant within the statutory maximum applicable to the conspiracy, it could determine both the amount and the kind of controlled substances for which the defendant was held responsible). Yet, again, factors that increase the minimum sentence but do not increase it beyond the maximum are not subject to Apprendi's safeguards.[13] See, e.g., United States v. Goodine, 326 F.3d 26, 28, 32 (1st Cir. 2003), cert. denied 541 U.S. 902 (2004) (holding that drug quantity in § 841 is a "mere sentencing factor," and "a judge's determination of drug quantity can influence the mandatory minimum sentence imposed . . . .")

Accordingly, the government maintained that the statutory maximum of life (because of the prior

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[13] The Sixth Circuit, alone, applied Apprendi to factors that increased the minimum sentence. In United States v. Ramirez, 242 F.3d. 348 (6th Cir. 2001) the district court sentenced the defendant to a mandatory minimum of twenty years in prison after a jury convicted him of "conspiracy to distribute cocaine" and the judge found the quantity of cocaine to be more than five kilograms. Id. at 350. The Sixth Circuit reversed holding that "[a]ggravating factors . . ., that increase the penalty from . . . a lesser to a greater minimum sentence, are now elements of the crime to be charged and proved." Id. at 351. The court characterized Apprendi as having two holdings:

> *[F]irst*, that courts must count any 'fact' that increases the 'penalty beyond the prescribed statutory maximum' as an element of the offense . . . and second, that it 'is unconstitutional for a legislature' to treat 'facts that increase the prescribed range of penalties to which a criminal defendant is exposed' as mere sentencing factors.

Id. at 350 (Siler, J. concurring).

Since the drug quantity increased the range of penalties it had to be charged in an indictment and proven before a jury.

conviction, see 21 U.S.C. § 841(b)(1)(A)) was framed by Malouf's plea to the 5 kilogram indictment, and the specific sentence within that range was framed by judicial findings about the amount attributable to him. The government's position pivots on Apprendi's focus on statutory maximums, on Harris' distinction between minimum and maximum sentences, and on Harris' reaffirmation of the distinction between traditional sentencing factors and offense elements established in Almendarez-Torres. See Goodine, 325 F.3d at 28-31 (where the First Circuit also relied on Apprendi, Harris, and Almendarez-Torres). However, these holdings have been substantially muddied, if not entirely undermined, by the Court's decisions in Blakely, Booker, and Shepard.

### C. *Blakely, Booker, and Shepard*

Blakely broadened Apprendi by requiring that all facts "which the law makes essential to the punishment" be subject to Sixth Amendment protections. Blakely, 124 S. Ct. at 2537 (quoting 1 J. Bishop, Criminal Procedure § 87 (2d ed. 1872)). The Court effectively chose an "impact" test, focusing on the impact of such facts on punishment, rather than on the formalistic distinctions between sentencing factors and offense elements. Its concern was not simply about a fact's effect on the statutory maximum, but more generally, about its effect on punishment.

In Booker, the Court reaffirmed this approach by applying it to the Federal Sentencing Guidelines. See 125 S. Ct. at 749 (Stevens, J.). The Sixth Amendment, the Court found, prevents federal judges from making factual determinations that increase a defendant's sentence under the Guidelines on the basis of facts not reflected in the jury's verdict. See id. at 756. The Court rejected the government's argument that the Federal Sentencing Guidelines were "guidelines" after all - not the "diktats" that some critics described. See Jose Cabranes & Kate Stith,

Fear of Judging: Sentencing Guidelines in the Federal Courts 95 (1998) (describing the Federal Sentencing Guidelines as a set of "administrative diktats" that the Commission "promulgated and enforced ipse dixit").

An impact test necessarily casts doubt on Harris' distinction between mandatory minimum provisions and statutory maximums. It is difficult to envision a situation in which a fact that determines a mandatory minimum is not considered "essential" to punishment. Moreover, if Federal Sentencing Guidelines troubled the majority in Booker, despite the possibility of downward departures, mandatory minimum provisions are likely to be of even greater concern.[14]

And to complete the trilogy, dicta in Shepard even calls into question the "traditional sentencing factor" approach. In Shepard, the Court held that a sentencing court could only rely on prior convictions as predicates for Armed Career Criminal status, if the statutorily required characteristics of these convictions were evidenced by "the charging document, the terms of the plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant or [ ] some comparable judicial record of this information." 125 S. Ct. at 1263. Justice Thomas, concurring, went further, casting doubt on Almendarez-Torres, which he noted was "eroded" by the Court's subsequent decisional law. See id. (Thomas, J., concurring in part and concurring in the judgment). Indeed, he went so far as to count the votes for reversing Almendarez-Torres a majority of the

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[14] Indeed, two members of the Harris plurality, Justices Breyer and Scalia, took positions in Booker at odds with their Harris positions. In authoring the remedy portion of the opinion in Booker, Justice Breyer obviously - if reluctantly - accepted the rule of Apprendi, which he had not agreed to in Harris. See Booker, 125 S. Ct. at 756 (Breyer, J.). Justice Scalia, who joined the Harris plurality without opinion, also joined the Booker majority's broad statement of the Apprendi principle. See id. at 746 (Stevens, J.).

Court, he maintained, now recognized that Almendarez-Torres was wrongly decided. See id. (citing Almendarez-Torres, 523 U.S. at 246-49 (Scalia, J., joined by Stevens, Souter, and Ginsburg, J., dissenting); Apprendi, 530 U.S. at 520-21 (Thomas J., concurring)).

**D. District Court's Role in a Time of Changing Sentencing Law**

The question is this: Do I ignore Booker's impact on the Harris holding or Shepard's on Almendarez-Torres in sentencing this defendant? And do I apply the First Circuit's interpretation of 21 U.S.C. § 841 in Goodine and Perez-Ruiz notwithstanding their reliance on Supreme Court precedent which is crumbling?

Lower courts are facing this dilemma across the country. For the most part, they have been carving out "exceptions" to Harris or Almendarez-Torres, to avoid the issue. In United States v. Greer, 359 F. Supp. 2d 1376 (M.D. Ga. 2005), for example, the court held that declaring a defendant an Armed Career Criminal and thereby imposing a mandatory minimum 15-year sentence absent a jury finding of three previous felony convictions under 18 U.S.C. § 924(e)(1) violates the Sixth Amendment. See id. at 1380. The court effectively carved out a new distinction, not previously recognized, that the Sixth amendment applies to mandatory sentence enhancements that are based on the "nature of a prior conviction" while not "the fact of a prior conviction." Id. Other courts have sought new and different ways to interpret existing statutes, now informed by recent decisional law. In United States v. Harris, 397 F.3d 404 (6th Cir. 2005), for instance, the Court held that the imposition of a mandatory minimum sentence based on judicial determination of firearm type, as provided in 18 U.S.C. § 924(c) (the statute at issue in Harris and Castillo), would violate the Sixth Amendment. See Harris, 397 F.3d at 414.

The Court described the case as one of "first impression." Id. at 412.

My dilemma is slightly different. I could avoid any collision with Harris by reinterpreting § 841 as the Supreme Court did in Jones. In Jones, where the statute was equally susceptible to two interpretations, one of which raised "grave and doubtful questions" of constitutional law that the other did not, the court held that it should interpret the statute so as to avoid the constitutional questions. Jones, 526 U.S. at 239. But reinterpreting § 841 to bring it in line with recent Supreme Court law runs afoul of the First Circuit's pre-Booker interpretation in Goodine.

There has been considerable debate about what lower courts should do in the face of Supreme Court precedent that is now doubtful. One scholarly commentator has described various data (short of binding precedent) that a lower court might invoke, along a continuum of circumstances, to predict how its superior court will decide the matter on appeal. These data fall into the following categories, from the relatively concrete to the more abstract: (a) "'fragmented-majority dispositional rule[s],' meaning [ ] dispositional rule[s] endorsed by a majority of the Justices when such endorsement is fragmented across two or more opinions (and perhaps two or more cases) in a manner depriving the rule of precedential status[;]" (b) dicta contained in various Justices' opinions; (c) Justices' declarations of their legal positions in public fora other than written judicial opinions; and (d) other informal information concerning particular Justices' general ideological commitments or tendencies. Evan H. Caminker, Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decisionmaking, 73 Tex. L. Rev. 1, 17-18 (1994) (hereinafter Caminker, Precedent and Prediction] see generally Kent Greenawalt, Reflections on Holding and Dictum, 39 J. Legal Educ. 431 (1989).

Yet, in this case, I need not go so far as to advocate the legitimacy of invoking non-binding precedent. In my judgment, the breadth of the holdings in Booker and Blakely *have* in fact overruled Harris.[15] The Court has gone from holding that the Sixth Amendment is implicated in the determination of facts that increase a statutory maximum (Apprendi) to applying the Sixth Amendment to all facts "essential to the punishment" (Booker and Blakely). It has extended the application of the Sixth Amendment from statutory maximum penalties (Apprendi) to the mandatory "Guidelines" (Booker).[16]

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[15] Indeed, what I am doing in the instant case is consistent with Caminker's precedent model:

> Sometimes the demise of an old Supreme Court precedent is foreshadowed by newer binding precedents that are inconsistent with the reasoning or result of the old case. In such circumstances, an inferior court might conclude that the newer precedents implicitly overrule the old. Because the inferior court reaches this conclusion simply by interpreting binding precedents, the court can fairly be characterized as following the precedent model.

Caminker, Precedent and Prediction at 20 n.73 (citation omitted).

[16] Indeed, I do not regard this as a case of "anticipatory overruling," which the Court decried in Rodriguez de Quilas v. Shearson/American Express, Inc., 490 U.S. 477, 484 (1989). In my judgment, the holdings of Booker and Blakely apply directly here. And they reflect not simply aberrant decisions, but a consistent decisional law across a number of cases.

One commentator described a similar dilemma after Brown v. Board of Education, 347 U.S. 483 (1954).

> Brown v. Board of Education, decided in 1954, rejected the separate-but-equal doctrine and held that racial segregation in public education was constitutionally impermissible. Two challenges to segregation policies on buses followed the Brown decision. At the time those cases arose, the

And, even if one does not characterize this group of holdings as overruling Harris, plainly the reasoning underlying them does overrule Harris. At worst, this is Caminker's category (a) situation, described above, in which a majority of the Justices have endorsed a particular legal rule that is deprived of precedential status simply because it is "fragmented across two or more opinions." Caminker, Precedent and Prediction at 17-18.

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> Supreme Court had not expressly overruled Plessy v. Ferguson [163 U.S. 537 (1896)], which allowed segregated public transportation. Under the Rodriguez view, the lower courts would have been required to follow Plessy and uphold the segregated bus policies, even though Brown clearly disapproved of public racial segregation. In fact, lower courts refused to follow Plessy. One lower court noted that 'a judicial decision, which is simply evidence of the law and not the law itself, may be so impaired by later decisions as no longer to furnish any reliable evidence.'

C. Steven Bradford, Following Dead Precedent: The Supreme Court's ill-advised Rejection of Anticipatory Overruling, 59 Fordham L. Rev. 39, 71 (1990).

Bradford added:

> The question is not whether the lower court should follow the Supreme Court but how the lower court should follow the Supreme Court. When the Supreme Court casts doubt on its own precedent, it is better for the lower court to reject the doubtful precedent and follow the doctrinal developments in more recent decisions. The same policies that usually favor stare decisis favor anticipatory overruling in these situations.

Id. at 75.

## E. Section 841 after *Blakely*, *Booker* and *Shepard*

Section 841, after all, is a hybrid provision - with offense-defining aspects and ostensibly sentencing regulating portions. Its structure mirrors the statute in Jones, which begins with a principal paragraph appearing to list a series of obvious offense elements, followed by numbered paragraphs containing apparent sentencing factors. See Jones, 526 U.S. at 230, 232. However, as in Jones, this "superficial impression" about the nature of the provision's components is problematic because the numbered penalty subsections "not only provide for steeply higher penalties, but condition them on further facts (injury, death) that seem quite as important as the elements in the principal paragraph . . . ." Id. at 233. Further, as the Jones Court explained, it is "at best questionable whether the specification of facts sufficient to *increase a penalty range by two thirds*, let alone from 15 years to life, was meant to carry none of the due process safeguards that elements of an offense bring with them for a defendant's benefit." Id.

In the instant case, the "further facts" on which enhanced penalties are based - injury, scope of the operation (as defined by quantity) - are as important as the general elements in § 841 (a) - manufacture, distribution, nature of the controlled substance. Moreover, injury and quantity are the kinds of factors typically related to the offense rather than to characteristics of the offender. Indeed, I have already interpreted one aspect of § 841, the portion increasing punishment whenever "bodily injury" results, under this rationale. See United States v. Martinez, 234 F. Supp. 2d 80 (D. Mass. 2002).[17]

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[17] I distinguished Harris, holding that "bodily injury" is an element of the offense necessarily determined by the jury because such a finding increased both the maximum and minimum terms.

And the punishment ranges - minimum and maximum - increase substantially with the finding of each additional aggravating factor. The result is not a mere two-year increase as in Harris. For Malouf, the mandatory minimum takes him from a Guidelines range that could only go as high as 71 months (without departure), to 120 months. As one scholar noted, " [a]s a matter of statutory interpretation, . . . a court might conclude that inclusion of a mandatory minimum in an otherwise offense-defining statute, rather than enactment as a clearly demarcated sentencing-regulating provision, indicated legislative intent to make that mandatory minimum a statutory element of the offense." Priester, Structuring Sentencing at 878 n.92 (2004).

The better view in my judgment is to conclude that § 841 is an offense-defining statutory provision, all elements of which must be tried before the jury. Out of an abundance of caution, then, I interpreted Malouf's plea as an admission to one element of conspiracy - that he was a participant in a conspiracy - but I reserved for a jury-waive trial the determination of another element - statutory quantity.

### F. An Alternative Holding: Due Process

While sentencing law is being reexamined in courts across the country - appropriately, in the judgment of this Court - one thing is clear: There is a new concern for procedural fairness in the finding of facts. In the instant case, a substantial mandatory minimum sentence pivots on a finding of a specific quantity. Quantity can be "a rough measure of an offenders culpability to the extent it reflects the offender's position within the drug distribution

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I analogized it to aggravated offenses, and lesser included offenses. The aggravated crime was distribution accompanied by serious bodily injury ("aggravated distribution"); the lesser included offense was simple distribution (distribution "simpliciter").

network." Paul J. Hofer & Mark H. Allenbaugh, The Reason Behind the Rules: Finding and Using the Philosophy of the Federal Sentencing Guidelines, 40 Am. Crim. L. Rev. 19, 71 (2003). As Hofer and Allenbaugh noted, the legislation appears to reflect the principal that "leaders of drug distribution operations will be linked to large amounts, while underlings will be linked only to smaller amounts reflecting their position as wholesale distributer, street-level retail dealer, etc."[18] Id. at 71-72. The legislative history of the Anti-Drug Abuse Act of 1986, which included substantial amendments to § 841(b), describes the quantities tied to the ten-year mandatory minimum penalties as typical of "major traffickers, the manufacturers or the heads of organizations, who are responsible for creating and delivering very large quantities," while the quantities tied to five-year minimum penalties as typical of "managers of the retail traffic, the person who is filling the bags of heroin, packaging crack cocaine into vials . . . and doing so in substantial street quantities." HR. Rep. No. 99-845, at 11-12 (1986).

In the past, before the Federal Sentencing Guidelines and mandatory minimum statutes, courts looked to other evidence of the scope of drug dealing to determine sentences (e.g., the defendant's standard of living, whether he dealt in cash, etc.). In contrast, under § 841, quantity is all, despite the fact that it may well depend on variables that have nothing to do with the real scope of the offense, or defendant's role in it (e.g., how long the government happened to have

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[18] In fact, the statute does not work that way; the mechanistic emphasis on quantity sweeps street dealers into the mix, solely by virtue of what they have distributed, see U.S.S.C., Report to Congress: Cocaine and Federal Sentencing Policy (2002), available at http://www.ussc.gov/r_congress/02crack/2002crackrpt.htm, or the length of the government surveillance.

surveilled the defendant, how explicit a co-defendant was about amounts, etc.).[19]

If quantity figures so prominently in this important decision, it is not unreasonable to ask, as the court did of the Federal Sentencing Guidelines in United States v. Gray, 362 F. Supp. 2d 714 (S.D. W. Va. 2005) - what level of confidence should a decisionmaker have in that fact before it sentences? The burden of proof, the Gray court noted, allocates the "risk of error between the litigants" and indicates the "relative importance attached to the ultimate decision." Id. at 720 (quoting Addington v. Texas, 441 U.S. 418, 423 (1979)). "As a tool for reducing the risk of error," the court noted, "reasonable doubt retains its usefulness in the advisory regime." Id. at 723. Accordingly, the court also noted that, while it would calculate the Guidelines range under the usual preponderance standard, it would then determine whether that range would have been different had it evaluated the facts by the beyond a reasonable doubt standard, as a way to determine how much weight to give the "advice" of the Guidelines.[20] Id.

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[19] In United States v. Dicenso, Criminal No. 03-10323, I sentenced Tomas Cubilette ("Cubilette") on September 30, 2004, and Carlos Diaz ("Diaz") on May 4, 2005. Neither had the benefit of a motion for a downward departure based on "substantial assistance" to the government, even though both cooperated immediately upon arrest. Cubilette described his drug trafficking in general terms; Diaz was more explicit. As a result, Diaz's Guidelines numbers were higher than Cubilette's based on his own interview. The result made no sense; the testimony at trial suggested that they were at the same level. Moreover, Cubilette's presentence report disclosed the purchase of an expensive car for cash, surely a factor that gives rise to the inference of drug dealing.

[20] The commentary to § 6A1.3 of the Guidelines states, "[t]he Commission believes that use of a preponderance of the evidence standard is appropriate to meet due process requirements and policy concerns in resolving disputes regarding application of the guidelines to the facts of a case." U.S.S.G. § 6A1.3, cmt. (2004). However, Justice Thomas' dissent to the

In the instant case, I go further. If a substantial sentence hinges on a finding of a specific quantity, then, in the language of Gray, I (and the public) should have a high degree of confidence in this finding. In effect, this was the message of the Court in McMillan v. Pennsylvania, where despite upholding a mandatory minimum sentence of five years for visible possession of a firearm, see supra note 11, the Court suggested a different result when the statute at issue gives the "impression of having been tailored to permit the visible possession finding to be a tail which wags the dog of the substantive offense." Id. at 88.

Moreover, to the extent that the procedural concerns of the majority in Booker were assuaged by construing the Guidelines as advisory, that alternative is not available under § 841. Once a given quantity is found, the statute's range is mandatory and binding.

## III. APPLYING THE BURDEN OF PROOF TO THE FACTS

### A. Mandatory Minimum or Not

I agree with the government that Malouf was an important customer of Nicholson's. He may well have been one of Nicholson's most important customers. Indeed, the wiretaps suggest that there were times when Nicholson allowed Malouf to have a running "tab," or money owed for transactions over a period of time, paid off as Malouf received payment from his customers. However, Malouf was also an addict; Nicholson even asked during one exchange, "are you still smoking [cocaine]?," reflecting a certain skepticism that Malouf could be counted on to follow through.

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remedial opinion in Booker called into question the assumption in the comments to the Guidelines that the preponderance standard satisfies due process concerns. Booker, 125 S. Ct. at 797 (Thomas, J. dissenting).

The government took the position that the defendant was responsible for 581.175 grams of cocaine (not counting amounts outside of the wiretap period), 81.175 grams over the 500 gram mandatory minimum trigger. Defendant argued that he purchased less than that amount. While he challenged a number of the transactions, only three bear discussion - the transactions on April 25, 2003, April 27, 2003, and June 11, 2003.

As described supra in Part I.B., the defendants spoke over the phone in a sort of code. Sometimes the code was completely transparent; more often, particularly when the drug involved or the specific quantity was at issue, the code was unclear. Sometimes the transaction was followed up by government surveillance, which confirmed that a drug deal was consummated; sometimes it was not. I have scrutinized each and every conversation, as well as the accounts of the surveillance that followed them.

1. On April 25, 2003, Nicholson and Malouf agreed to meet and discussed a good location. At some point, Malouf asked Nicholson to meet him at "Bagnell's" in 15 minutes. Nicholson called his girlfriend and told her that he was "at Bagnell's" waiting for Malouf to show up with money. Agents surveilled the scene and saw Malouf arrive and walk over to Nicholson. Nicholson reached into his helmet (he was on a motorcycle) and "appeared to take something out." Malouf continued walking toward the motorcycle and reached into his right pocket. Each then drove away.

Nothing in the prior conversation suggested the type or quantity of drug. While the government characterized this as a one ounce cocaine transaction (28.35 grams), based on the amount and regularity with which Malouf and Nicholson dealt, I cannot agree under either a fair preponderance or a beyond a reasonable doubt standard.

2. On April 27, 2003, Malouf called Nicholson and they agreed to meet at noon. Nicholson told

Malouf to bring "eight million dollars with you" (the meaning of which was unclear). Agents surveilled Malouf, but lost him for about ten minutes. Malouf was seen by agents driving to a Dunkin' Donuts in Pembroke and parking there. At that point, Malouf exited his car, opened the trunk and "hid a brown lunch bag." The government added that the brown lunch bag probably contained the cocaine he had just picked up from Nicholson (1 ounce or 28.35 grams). Nothing in the record supports that inference.

3. On June 11, at 3:01 p.m., Malouf called Nicholson, indicating that his "friend" called, that the "friend" wanted a "block intact, a 12-dollar item," and that Malouf promised to find out about it. The "block, intact, a 12-dollar item," referred to an ounce of cocaine, according to the government. Malouf indicated that he would get the item so long as the "friend" brought him the money. He asked Nicholson, "Should I tell him that if he comes and brings the money . . . [I'll] call you?" Nicholson replied in the affirmative so long as it was "C.O.D." or cash on delivery. Some time later, Malouf called and said that the individual had put cash in his hand, and that he would call Nicholson en route. Two hours later, Malouf called, saying he was "coming up on Freetown" about "fifteen minutes away." Nicholson said, "Okay, I'll see you when you get here." This transaction was a close call. Quantity was arguably specified, but there was no surveillance of the transaction, and therefore no indication that it had actually taken place. The government had no calls after June 11 indicating that the deal had occurred (even though the wiretap continued until June 17.) There was no confirmation that money or drugs had changed hands on that occasion.

I concluded that, if the standard were a fair preponderance of the evidence, I would clearly agree with the government and charge another 28.35 grams

to Malouf. If the standard were beyond a reasonable doubt, I would not.[21]

By June 11, the pace of Malouf's dealings with Nicholson had apparently slowed down. Nicholson was plainly dealing with other customers. While Malouf may well have been a good customer, some of Nicholson's calls reflect skepticism that Malouf would be able to follow through, to pay what he owed. The meeting locations changed; the location mentioned in the June 11 calls was an entirely new site for Nicholson and Malouf. Under the circumstances, I cannot conclude, with what I believe to be the necessary certainty, that this transaction occurred.

Without these three transactions, on April 25, April 27, and June 11, Malouf's distribution totals fell below 500 grams, and the mandatory minimum did not apply.

## B. The Application of the Guidelines

The Federal Sentencing Guidelines set a base offense level for the distribution of marijuana and cocaine. Indeed, they require each substance to be converted to its marijuana equivalent through the drug equivalency table. The parties agree that pursuant to U.S.S.G. § 2D1.1(a)(3) and § 2D1.1(c)(7), Malouf is accountable for at least 100 kilograms of marijuana (translating the cocaine into marijuana equivalencies and adding the marihuana [*sic*] amounts

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[21] The government argued that the exchange between Malouf and Nicholson suggested an intent to complete the transaction which should be sufficient under § 841. I do not agree. The methodology for calculating drug quantity is different under the Guidelines than it is under 841. Under the Guidelines the court could consider other transactions as "relevant conduct," even attempted transactions. See U.S.S.G. § 2D1.1(b)(5) (2004).

However, § 841 is clear. It is dealing with the actual distribution of a certain quantity of drugs. In any case, even if it did allow "attempts," the indictment in the case at bar did not so specify.

to it), but less than 400 kilograms. As such, the base offense level is 26. With acceptance of responsibility - with which the government concurs - Malouf is entitled to a three level reduction to an offense level of 23.

Malouf's criminal history was calculated at eight points, or level IV. Two of those points involved traffic offenses - driving under the influence and operating after a license suspension. The defendant moved for a one-level downward departure, with those two points eliminated, and I agreed. I concluded that his criminal history should have been at six points, or a level III. The resulting Guidelines range was 57-71 months.

The defendant sought a further downward departure because of the substantial, and documented, mental and physical abuse that he suffered as a child at the hands of his father. Indeed, counsel for the defendant had known the family for a considerable period of time. He had represented the defendant's father, who served time on drug charges. Moreover, the story of Malouf's troubled childhood was confirmed by the letters sent to the Court. In addition, as described above, Malouf was addicted to a variety of substances for a considerable period of time.

Nevertheless, I declined to order a further reduction in his sentence from the range calculated above.

I sentenced the defendant to the mid-point of the range, or sixty months. Sixty months was a substantial sentence. I coupled Malouf's sentence with the requirement of drug treatment both in prison and outside. Malouf's sentence was more than adequate to meet the purposes of sentencing under 18 U.S.C. § 3553(a); it enabled him to receive treatment for his

addiction, to be punished, and to be off the streets for a considerable amount of time.

**SO ORDERED.**

**Date: June 14, 2005**

**/s/NANCY GERTNER, U.S.D.J.**

## APPENDIX F

## UNITED STATES CODE

### Section 841. Prohibited acts A

**(a) Unlawful acts**

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally -

**(1)** to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

**(2)** to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

**(b) Penalties**

Except as otherwise provided in section 849, 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

**(1)(A)** In the case of a violation of subsection (a) of this section involving -

**(i)** 1 kilogram or more of a mixture or substance containing a detectable amount of heroin;

**(ii)** 5 kilograms or more of a mixture or substance containing a detectable amount of -

**(I)** coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

**(II)** cocaine, its salts, optical and geometric isomers, and salts of isomers;

**(III)** ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

**(IV)** any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

**(iii)** 50 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

**(iv)** 100 grams or more of phencyclidine (PCP) or 1 kilogram or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

**(v)** 10 grams or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

**(vi)** 400 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N- [ 1- ( 2-phenylethyl ) -4-piperidinyl ] propanamide or 100 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide;

**(vii)** 1000 kilograms or more of a mixture or substance containing a detectable amount of marihuana, or 1,000 or more marihuana plants regardless of weight; or

**(viii)** 50 grams or more of methamphetamine, its salts, isomers, and

> salts of its isomers or 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 20 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or $8,000,000 if the defendant is an individual or $20,000,000 if the defendant is other than an individual, or both. If any person commits a violation of this subparagraph or of section 849, 859, 860, or 861 of this title after two or more prior convictions for a felony drug offense have become final, such person shall be sentenced to a mandatory term of life imprisonment without release and fined in accordance with the preceding sentence. Notwithstanding section 3583 of title 18, any sentence under this subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 5 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 10 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court

shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

**(B)** In the case of a violation of subsection (a) of this section involving -

**(i)** 100 grams or more of a mixture or substance containing a detectable amount of heroin;

**(ii)** 500 grams or more of a mixture or substance containing a detectable amount of -

**(I)** coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

**(II)** cocaine, its salts, optical and geometric isomers, and salts of isomers;

**(III)** ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

**(IV)** any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

**(iii)** 5 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

**(iv)** 10 grams or more of phencyclidine (PCP) or 100 grams or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

**(v)** 1 gram or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

**(vi)** 40 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N- [ 1- ( 2-phenylethyl ) -4-piperidinyl ] propanamide or 10 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide;

**(vii)** 100 kilograms or more of a mixture or substance containing a detectable amount of marihuana, or 100 or more marihuana plants regardless of weight; or

**(viii)** 5 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 50 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or $2,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 10 years and not more than life imprisonment and if death or serious bodily injury results from the use of such

substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. Notwithstanding section 3583 of title 18, any sentence imposed under this subparagraph shall, in the absence of such a prior conviction, include a term of supervised release of at least 4 years in addition to such term of imprisonment and shall, if there was such a prior conviction, include a term of supervised release of at least 8 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

**(C)** In the case of a controlled substance in schedule I or II, gamma hydroxybutyric acid (including when scheduled as an approved drug product for purposes of section 3(a)(1)(B) of the Hillory J. Farias and Samantha Reid Date-Rape Drug Prohibition Act of 2000), or 1 gram of flunitrazepam, except as provided in subparagraphs (A), (B), and (D), such person shall be sentenced to a term of imprisonment of not more than 20 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not less than twenty years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or $1,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 30 years and if death or serious bodily injury results

from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or $2,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. Notwithstanding section 3583 of title 18, any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 6 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under the provisions of this subparagraph which provide for a mandatory term of imprisonment if death or serious bodily injury results, nor shall a person so sentenced be eligible for parole during the term of such a sentence.

**(D)** In the case of less than 50 kilograms of marihuana, except in the case of 50 or more marihuana plants regardless of weight, 10 kilograms of hashish, or one kilogram of hashish oil or in the case of any controlled substance in schedule III (other than gamma hydroxybutyric acid), or 30 milligrams of flunitrazepam, such person shall, except as provided in paragraphs (4) and (5) of this subsection, be sentenced to a term of imprisonment of not more than 5 years, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or $250,000 if the defendant is an individual or $1,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 10 years, a fine not to exceed the greater of twice that

authorized in accordance with the provisions of title 18 or $500,000 if the defendant is an individual or $2,000,000 if the defendant is other than an individual, or both. Notwithstanding section 3583 of title 18, any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 2 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 4 years in addition to such term of imprisonment.

**(2)** In the case of a controlled substance in schedule IV, such person shall be sentenced to a term of imprisonment of not more than 3 years, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or $250,000 if the defendant is an individual or $1,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of a State, the United States, or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 6 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or $500,000 if the defendant is an individual or $2,000,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least one year in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at

least 2 years in addition to such term of imprisonment.

**(3)** In the case of a controlled substance in schedule V, such person shall be sentenced to a term of imprisonment of not more than one year, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or $100,000 if the defendant is an individual or $250,000 if the defendant is other than an individual, or both. If any person commits such a violation after one or more convictions of him for an offense punishable under this paragraph, or for a crime under any other provision of this subchapter or subchapter II of this chapter or other law of a State, the United States, or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 2 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or $200,000 if the defendant is an individual or $500,000 if the defendant is other than an individual, or both.

**(4)** Notwithstanding paragraph (1)(D) of this subsection, any person who violates subsection (a) of this section by distributing a small amount of marihuana for no remuneration shall be treated as provided in section 844 of this title and section 3607 of title 18.

**(5)** Any person who violates subsection (a) of this section by cultivating a controlled substance on Federal property shall be imprisoned as provided in this subsection and shall be fined any amount not to exceed -

**(A)** the amount authorized in accordance with this section:

**(B)** the amount authorized in accordance with the provisions of title 18;

**(C)** $500,000 if the defendant is an individual; or

**(D)** $1,000,000 if the defendant is other than an individual;

or both.

**(6)** Any person who violates subsection (a) of this section, or attempts to do so, and knowingly or intentionally uses a poison, chemical, or other hazardous substance on Federal land, and, by such use -

**(A)** creates a serious hazard to humans, wildlife, or domestic animals,

**(B)** degrades or harms the environment or natural resources, or

**(C)** pollutes an aquifer, spring, stream, river, or body of water,

shall be fined in accordance with title 18 or imprisoned not more than five years, or both.

**(7)** Penalties for distribution. - **(A)** In general. - Whoever, with intent to commit a crime of violence, as defined in section 16 of title 18 (including rape), against an individual, violates subsection (a) of this section by distributing a controlled substance or controlled substance analogue to that individual without that individual's knowledge, shall be imprisoned not more than 20 years and fined in accordance with title 18.

**(B)** Definition. - For purposes of this paragraph, the term "without that individual's knowledge" means that the individual is unaware that a substance with the ability to alter that individual's ability to appraise conduct or to decline participation in or communicate unwillingness to participate in conduct is administered to the individual.

**(c) Repealed. Pub.L. 98-473, Title II, § 224(a)(2), formerly § 224(a)(6), Oct. 12, 1984, 98 Stat. 2030; renumbered § 224(a)(2), Pub.L. 99-570, Title I, § 1005(a)(2), Oct. 27, 1986, 100 Stat. 3207-6**

**(d) Offenses involving listed chemicals**

Any person who knowingly or intentionally—

**(1)** possesses a listed chemical with intent to manufacture a controlled substance except as authorized by this subchapter.

**(2)** possesses or distributes a listed chemical knowing, or having reasonable cause to believe, that the listed chemical will be used to manufacture a controlled substance except as authorized by this subchapter; or

**(3)** with the intent of causing the evasion of the recordkeeping or reporting requirements of section 820 of this title, or the regulations issued under that section, receives or distributes a reportable amount of any listed chemical in units small enough so that the marking of records or filing of reports under that section is not required;

shall be fined in accordance with Title 18 or imprisoned not more than 20 years in the case of a violation of paragraph (1) or (2) involving a list I chemical or not more than 10 years in the case of a

violation of this subsection other than a violation of paragraph (1) or (2) involving a list I chemical, or both.

**(e) Boobytraps on Federal property; penalties; "boobytrap" defined**

**(1)** Any person who assembles, maintains, places, or causes to be placed a boobytrap on Federal property where a controlled substance is being manufactured, distributed, or dispensed shall be sentenced to a term of imprisonment for not more than 10 years or fined under title 18, or both.

**(2)** If any person commits such a violation after 1 or more prior convictions for an offense punishable under this subsection, such person shall be sentenced to a term of imprisonment of not more than 20 years or fined under title 18, or both.

**(3)** For the purposes of this subsection, the term "boobytrap" means any concealed or camouflaged device designed to cause bodily injury when triggered by any action of any unsuspecting person making contact with the device. Such term includes guns, ammunition, or explosive devices attached to trip wires or other triggering mechanisms, sharpened stakes, and lines or wires with hooks attached.

**(f) Ten-year injunction as additional penalty**

In addition to any other applicable penalty, any person convicted of a felony violation of this section relating to the receipt, distribution, manufacture, exportation, or importation of a listed chemical may be enjoined from engaging in any transaction involving a listed chemical for not more than ten years.

**(g) Wrongful distribution or possession of listed chemicals**

**(1)** Whoever knowingly distributes a listed chemical in violation of this subchapter (other than in violation of a recordkeeping or reporting requirement of section 830 of this title) shall be fined under title 18 or imprisoned not more than 5 years, or both.

**(2)** Whoever possesses any listed chemical, with knowledge that the recordkeeping or reporting requirements of section 830 of this title have not been adhered to, if, after such knowledge is acquired, such person does not take immediate steps to remedy the violation shall be fined under title 18 or imprisoned not more than one year, or both.